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THE AUTHORITY IN ENGLISH COURTS OF DECISIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

By C. WILFRED JENKS

I. *The existing English Cases*

1. THE existence of the Permanent Court of International Justice, and the accumulation of a series of Permanent Court decisions upon points of international law of increasing variety and importance, have created a new problem for the English courts, that of the extent to which they will regard pronouncements by the Permanent Court as authorities which they ought to follow. At first sight it might seem that the law of England upon this point has already been settled and can now be changed by legislation alone. In *In re Société Intercommunale Belge d'Électricité*, Farwell J. said:

> "My attention has been called to a judgment in a case which came before the Permanent Court of International Justice in which very similar questions arose, which were debated at considerable length and were finally determined by the Court in accordance with the contentions of the plaintiff in this case. Those judgments are judgments to which I must pay every respect, but they are not in any sense binding upon me, and although they may offer me assistance in showing the way in which the learned judges of that Court came to the conclusion which they did, they are not, as I have said, in any sense binding upon me, and if in this case I come to a conclusion different to that expressed by that Court, I am bound to give effect to it."[1]

When the same case reached the House of Lords (under the name of *Feist* v. *Société Intercommunale Belge d'Électricité*) Lord Russell of Killowen, speaking on behalf of all the law lords who sat in the case, said:

> "We were in the course of the argument referred to certain decisions and judgments in cases which came before the Permanent Court of International Justice sitting at The Hague. I do not, I need hardly say, treat these as in any way binding upon us."[2]

And in *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft*, Lord Wright, M.R., speaking for a unanimous Court of Appeal, prefaced a reference to the above passage from Lord Russell of Killowen's judgment in the *Feist* case with the remark:

> "His Lordship also quotes a passage from the decision of The Hague Court

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[1] [1933] 1 Ch. 684, at 689–90.

[2] [1934] A.C. 161, 173.

which has already been mentioned, and the way in which he introduces the question is very significant. He says 'I do not, I need hardly say, treat these as in any way binding upon us. . . .'."[1]

The decisions of the Permanent Court referred to in the above cases were, however, of a special character in that they did not relate to a question of public international law, and it would seem necessary to read the passages quoted in the light of this essential fact. The purpose of this article is to submit that the above quotations are not, for this reason, authorities for the proposition that a decision of the Permanent Court of International Justice upon a question of public international law is not binding upon an English court, that the question of the status of such a decision in an English court is still an entirely open one, and that in certain circumstances an English court should regard itself as bound by such a decision of the Permanent Court of International Justice.

2. Contrary to a widespread belief, the functions of the Permanent Court of International Justice are not strictly confined to the administration of international law. The Court has referred to itself as an "organ" of international law[2] and as a "tribunal of international law",[3] but its Statute does not restrict its activity to the application of international law,[4] the Court itself has pointed out that it is "bound to apply municipal law when circumstances so require",[5] and it has in fact frequently had occasion to apply and interpret municipal law in very varied types of cases.[6] Among the types of case in which questions of municipal law have come before the Court have been cases in which such questions have been submitted to it by special agreement between a state exercising its right of diplomatic protection and another state. The *Serbian* and *Brazilian Loans* cases,[7] the only Permanent Court decisions which have hitherto been referred to by an English court, were cases of this type, and the point as to the effect of a

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[1] [1937] A.C. 500, 514.

[2] *P.C.I.J.*, Series A, No. 7, p. 19.

[3] *P.C.I.J.*, Series A, Nos. 20/21, p. 124.

[4] Nor indeed does the Statute expressly direct its application of international law. See the additional observations of Judge Manley O. Hudson in the *Diversion of Water from the Meuse* case, *P.C.I.J.*, Series A/B, No. 70, at p. 76, cited at length in the *Law Quarterly Review*, No. CCXII, at pp. 519–24.

[5] *P.C.I.J.*, Series A, Nos. 20/21, at p. 124.

[6] Upon this subject see C. W. Jenks, "The Interpretation and Application of Municipal Law by the Permanent Court of International Justice", in *British Year Book of International Law*, Vol. XIX, 1938, at pp. 67–103.

[7] *P.C.I.J.*, Series A, Nos. 20/21.

gold clause upon which these cases were referred to in the judgments of Farwell J., Lord Russell of Killowen, and Lord Wright, M.R., was not decided by the Permanent Court as a point of public international law. It seems to have been decided on the basis of general principles for the interpretation of contracts which the Permanent Court will apply when interpreting contracts governed by municipal law; and if this was not the Court's intention, the point must be regarded as having been decided as a question of Serbian law in the one case and of Brazilian law in the other, the Court having noted later in its judgments that the contracts in question were governed by Serbian and Brazilian law respectively. Upon either hypothesis the Court's ruling has not the same value as a precedent as a decision by it upon a point of public international law. It is entirely legitimate that the Permanent Court should build up a body of principles which it will apply when called upon to determine the intention of parties to contracts, whether those contracts are governed by some municipal law, by the administrative law of the League of Nations, or by some other body of legal rules; such principles, however, are upon a different footing from rules of public international law recognized to be binding upon states. It may be desirable that some weight should be attached to them by municipal courts with a view to permitting the Permanent Court to exercise in this way a certain unifying influence upon different legal systems, but they can claim no higher status than this, and decisions based upon them are not authoritative expositions of a law binding upon states. Upon this view of the relevant passages from the decisions of the Permanent Court in the *Serbian* and *Brazilian Loans* cases, the House of Lords in *Feist* v. *Société Intercommunale Belge d'Électricité* and the Court of Appeal in *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* gave them exactly the sort of weight to which they are entitled. Passing to the second hypothesis, even as decisions upon Serbian and Brazilian law, assuming them to have been such, the relevant passages of the *Serbian* and *Brazilian Loans* cases have clearly not the same authority as precedents as a decision of the Permanent Court upon a question of public international law. The Court itself has pointed out that when it is necessary to apply the municipal law of a particular country it "must pay the utmost regard to the decisions of the municipal courts" of that country, "for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case".[1] Though decisive of the point at issue in the particular case,[2] a decision by the Permanent Court upon a question of municipal law can never, it would seem, be of more than persuasive authority as a precedent. Still less can a decision by the Permanent Court upon a question arising under one system of municipal law be of more than persuasive authority if the same question subsequently arises under another system of municipal law before a court established under that second system. These, upon the hypothesis under consideration, were the facts when the *Serbian* and *Brazilian Loans* cases were referred to by English courts as not being binding upon them. They were decisions upon Serbian and Brazilian law which were of some interest as analogies but which had no other standing. In view of these special features of the *Serbian* and *Brazilian Loans* cases, the refusal of English courts to regard them as binding authorities cannot be considered to have prejudged the question whether there may not be circumstances in which an English court ought to treat a decision by the Permanent Court upon a question of public international law as being such an authority.

3. Doubtless the English courts which referred to the *Serbian* and *Brazilian Loans* cases did not distinguish explicitly between their special nature and a decision by the Permanent Court upon a question of public international law, but they seem to have been conscious that the *Loans* cases presented special features. Thus Farwell J., when refusing to follow them, said: "I have to construe this bond in accordance with the principles of construction which obtain in this country, because this contract is governed by English law."[3] Lord Russell of Killowen, after saying that he did not regard the decisions of the Permanent Court of International Justice which had been cited to the House of Lords as binding upon it, added, as though in part explanation of this: "Indeed the relevant facts and words under consideration were very different from those which have been under consideration here."[4] Lord Wright also, in the *Rex* v. *International Trustee* case, referred to *Feist's* case as being the governing authority "for an English court considering an English contract".[5] The *Serbian Loans* case he treated simply as a matter of interest, but after referring to the passage from it quoted by Lord Russell in *Feist's* case he said:

> "We particularly refer to this part of his lordship's judgment because it illus-

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[1] *P.C.I.J.*, Series A, Nos. 20/21, p. 124.

[2] *P.C.I.J.*, Series A, No. 13, p. 33.

[3] [1933] 1 Ch. 684, 690.

[4] [1934] A.C. 161, 173.

[5] [1937] A.C. 500, 512.

> trates a matter of very considerable importance. The gold clauses in bonds and obligations are very common in international contracts and in every part of the world. It would be a very serious matter if contracts of that character were treated by particular courts as having a different meaning, in the absence of language and surrounding circumstances of a decisive character compelling that conclusion. The construction of such commercial clauses ought to be as far as possible uniform unless there are the strictest considerations involving a different construction."[1]

This is appropriate language upon the assumption that the question in Lord Wright's mind was that of the weight to be given in an English court to a decision by the Permanent Court relating to a legal system other than that governing the contract before the Court. Approaching the matter from this angle he stresses the desirability of attaching weight to the Permanent Court's decisions with a view to promoting uniformity in respect of commercial law between different legal systems. It is difficult to believe that he would have used this language if he had been thinking of the weight to be attached to a pronouncement by the Permanent Court upon a question of public international law. This last question must therefore be regarded as being still an open one, and the only definite conclusion which can be drawn from the existing English cases is that English courts recognize the desirability of attaching a certain weight to Permanent Court decisions on questions of commercial law with a view to the promotion of uniformity between the different legal systems which govern commercial contracts in different parts of the world.

4. Curiously enough the only other point upon which a decision of the Permanent Court appears to have been cited to an English court was also not a point of public international law. When *Rex* v. *International Trustee for the Protection of Bondholders* reached the House of Lords it was contended for the appellant, the Crown, that the proper law of the contract in question was the law of the United States. This raised the points whether according to the English rules of conflict of laws there is any presumption that a sovereign state, when entering into a loan contract in a foreign country, intends to contract on the basis of its own law, and whether if such a presumption exists it had been rebutted in the case before the court. Counsel for the respondents referred to the *Serbian* and *Brazilian Loans* cases as authorities for the proposition that where a government is borrowing it cannot be presumed that the sovereign state has made the substance of its debt and the validity of the obligations accepted by

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[1] [1937] A.C. 500, 515.

it in respect thereof subject to any law other than its own.[1] The Attorney-General, in reply, distinguished the Permanent Court of International Justice cases on the ground that the bonds there in question were issued in several countries, thus differing materially from those under discussion in the case before the court.[2] The House of Lords held unanimously that these bonds were governed by the law of the United States and no member of the House referred in his speech to the decisions of the Permanent Court of International Justice. There is thus suggested an impression that the House of Lords has taken a view different from that of the Permanent Court of International Justice and has done so without discussing whether it ought to attach some weight to the opinion of the Permanent Court. Closer examination suggests two qualifications upon this first impression. In the first place, the difference of opinion between the House of Lords and the Permanent Court appears, on further consideration, to be little more than one of emphasis. In the *Serbian* and *Brazilian Loans* cases the presumption that a sovereign state intends to contract on the basis of its own law was one of a number of *indicia* pointing in the same direction upon which the Permanent Court relied in reaching the conclusion that the bonds were governed by the law of the borrowing state. The House of Lords in *Rex* v. *International Trustee for the Protection of Bondholders* admitted that "the circumstance that a government is a party is entitled to great weight in drawing the appropriate inference"[3] as to the law which the parties intended to apply, but held that in the case before it other *indicia* pointed to an intention to make the bonds subject to United States law. In this connexion it attached decisive importance to the fact that the bonds were secured by a pledge agreement made in America and performed in America by the deposit with an American company of securities on terms which appeared to give rights governed by American law.[4] There is therefore no real inconsistency between the decisions of the Permanent Court and the decision of the House of Lords. In the second place, the fact that the House of Lords did not consider it necessary to discuss the Permanent Court's decisions upon the law applicable to loan contracts by sovereign states has no bearing upon the question of the authority which an English court ought to attach to Permanent Court decisions on questions of public international law. The question which was the proper law of the contract fell to be decided by the House of Lords in the *Rex* v. *International Trustee* case according to the English rules of conflict of laws. Now the Permanent Court has itself recognized the municipal character of the rules of conflict of laws. In the *Serbian Loans* case, speaking of

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[1] [1937] A.C. 500, 527.

[2] [1937] A.C. 500, 528.

[3] *Per* Lord Atkin, [1937] A.C. 500, 531. The other speeches are in the same sense.

[4] *Per* Lord Atkin, at pp. 553–4; see also Lord Russell of Killowen at pp. 558–9, Lord Maugham at pp. 571–2, and Lord Roche at pp. 574–5.

> "that branch of law which is at the present day usually described as private international law or the doctrine of the conflict of laws", it said "the rules thereof may be common to several states and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between states. But apart from this, it has to be considered that these rules form part of municipal law".[1]

Once it is admitted that the Permanent Court must necessarily apply municipal law in a variety of circumstances it follows that that Court must evolve its own rules for the choice of law,[2] but these rules will not as such have any greater title to be regarded as "true international law governing the relations between states" than the rules of conflict applied by any other court. They will be simply the rules for the choice of law applied by the Permanent Court and not rules for the choice of law which states are under an obligation to apply in the proceedings of municipal courts. The attitude of an English court towards these rules therefore has little connexion with the attitude which it will or ought to take towards decisions of the Permanent Court on questions of public international law. It is nevertheless permissible to regret that the House of Lords did not discuss the views of the Permanent Court on the question whether there is a presumption that a sovereign state intends its loan contracts to be governed by its own law. Though the Permanent Court's rules for the choice of law cannot be regarded as binding upon any municipal court it is desirable that municipal courts should attach some weight to these rules, should follow them whenever possible, and when refusing to apply them to materially different facts should indicate the differences which they regard as material. If municipal courts were to do this, the Permanent Court might be able to exercise a useful unifying influence upon the different systems of rules of conflict, and thus to supplement the attempts which are being made to unify these systems by means of international conventions.

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[1] *P.C.I.J.*, Series A, Nos. 20/21, p. 41.

[2] See A. Hammarskjöld, *Juridiction Internationale*, "La Cour Permanente de Justice Internationale et le Droit International Privé", at pp. 281–2, and C. W. Jenks, "The Interpretation and Application of Municipal Law by the Permanent Court of International Justice", in *British Year Book of International Law*, Vol. XIX, 1938, at pp. 95–7.

5. In the absence of any case in which a Permanent Court decision has been cited to an English court in connexion with a point of public international law, it is of some interest to refer to what appears to be the only case in which an English court has referred in general terms to the existence and status of the Permanent Court. In *In re Piracy Jure Gentium*, Viscount Sankey L.C., delivering the report of the Judicial Committee upon a question submitted to it by special reference as to whether actual robbery is an essential element in the crime of *piracy jure gentium*, spoke as follows:

> "In considering such a question, the court is permitted to consult and act upon a wider range of authority than that which it examines when the question for determination is one of municipal law only. The sources from which international law is derived include treaties between various states, state papers, municipal Acts of Parliament and the decisions of municipal courts, and last, but not least, opinions of jurisconsults or textbook writers. It is a process of inductive reasoning. It must be remembered that in the strict sense international law still has no legislature, no executive and no judiciary, though in a certain sense there is now an international judiciary in The Hague Tribunal and attempts are being made by the League of Nations to draw up codes of international law. Speaking generally, in embarking upon international law, their Lordships are to a great extent in the realm of opinion, and in estimating the value of opinion it is permissible not only to seek a consensus of views, but to select what appear to be the better views upon the question."[1]

This somewhat grudging recognition of the existence of the Permanent Court may seem unpromising to any one disposed to argue that there are circumstances in which an English court should regard a decision by the Permanent Court as a binding authority; but later in the report Lord Sankey remarked that "it must be remembered, however, that every case must be read *secundum subjectam materiam* and must be held to refer to the facts in dispute";[2] and a casual under-estimate of the significance of the Permanent Court in a case in which no decision by the Permanent Court was relevant can hardly be considered to have concluded the question of the authority of Permanent Court decisions in English courts. It is therefore proposed to discuss this question upon principle and to consider in turn Permanent Court decisions relating to treaties and Permanent Court decisions relating to customary international law.

6. Before so doing it is relevant to inquire whether English

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[1] [1934] A.C. 586, at pp. 588–9.

[2] [1934] A.C. 586, 591.

courts have ever indicated the extent to which they will regard as authorities decisions by international tribunals other than the Permanent Court of International Justice. The reports do not appear to contain any indications upon this subject. Decisions of the Mixed Arbitral Tribunals established by the Peace Treaties after the war of 1914–18 have been cited to English courts,[1] but it does not appear that an English court has ever thought it necessary to discuss such a decision or to express any view concerning the weight to be attached to it. In the *Fagernes*[2] the Attorney-General referred the Court of Appeal to the *North Atlantic Coast Fisheries Arbitration*[3] and to the decision of the Central American Court of International Justice in *Salvador* v. *Nicaragua*,[4] but he quoted these cases in support of his argument that there is no recognized rule of international law as to when inlets of the sea are of a territorial character. The only member of the Court who referred to either case was Lord Atkin who, after declaring that "It is quite certain that there is at present no such agreement in the practice of civilized states as to afford a definite rule to regulate territorial claims to the waters of gulfs and bays for the future", referred to a passage in the award of the Permanent Court of Arbitration in the *North Atlantic Fisheries Arbitration* as a happy statement of exceptions which it will be necessary to admit in the event of any rule being recognized in the future as a principle of international law.[5] This gives no further guidance on the subject, and the present writer has found no other case in which an international decision has been cited to an English court. There have, of course, been countless cases in which foreign prize cases have been cited in the Prize Court, but the question of the weight to be attached to such decisions presents problems entirely different from those which arise in connexion with the authority of the decisions of international tribunals.

II. *The Principles applicable when the Permanent Court Decision relates to a Treaty*

7. For the purpose of the present discussion the expression "Permanent Court decisions relating to treaties" is used with reference to decisions relating to particular treaties. In so far as

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[1] See *Kramer* v. *Attorney-General*, [1923] A.C. 528, 531; *Jebura* v. *Ottoman Bank*, [1927] 2 K.B. 254, 260.

[2] [1927] P. 311, 316–17.

[3] *Hague Court Reports*, p. 141.

[4] (1917) 11 *American Journal of International Law*, p. 674.

[5] [1927] P. 311, 325.

a Permanent Court decision bears upon a general rule of international law relating to treaties, it stands upon the same footing as a decision bearing upon some other rule of customary international law. Decisions relating to particular treaties, on the other hand, are governed by special considerations which will now be examined.

8. It would seem that the first stage in an inquiry whether a Permanent Court decision relating to a particular treaty is binding upon an English court must be to determine whether the decision is binding upon Great Britain as an international person. From this standpoint Permanent Court decisions relating to treaties may be divided into three main groups:

(*a*) The decision may have been given in a case to which Great Britain was a party. In this event the decision given is binding upon Great Britain in virtue of the provisions of Article 13 (4) of the Covenant and of Articles 59 and 60 of the Statute of the Court. In the same group must be classed cases in which Great Britain, though not an original party to the case, exercised the right of intervention conferred by Article 63 of the Statute upon parties to a treaty the construction of which is in question before the Court. In such cases Great Britain is, in accordance with Article 63, bound by the decision given in the same manner as if she had been an original party to the case.

(*b*) The decision may have been given in a case in which Great Britain, though a party to the treaty under consideration, was not an original party to the case and did not intervene, but in which the jurisdiction of the Court was derived from a provision of the treaty under consideration vesting in the Court compulsory jurisdiction in relation to that treaty. In such cases the Court's decision is not binding upon Great Britain in virtue of any provision of the Covenant or of the Statute of the Court. This much is clear from Article 59, and *ex contrario* from the second paragraph of Article 63 of the Statute of the Court. In the submission of the present writer, however, such a decision would be binding upon Great Britain by virtue of the fact that she is bound by the treaty to which the decision relates, and is bound by that treaty subject to the meaning and operation which the Court has ascribed to it. Against this submission it can be argued that on the basis of Article 59 and the second paragraph of Article 63 of the Statute it would be open to Great Britain in any subsequent proceedings before the Court to contend for a view of the interpretation or effect of the treaty which differed from that adopted by the Court in the earlier case. Any such contention would appear to place excessive reliance upon Article 59 and the second paragraph of Article 63. It is the same treaty which is in force for all the parties, and where all of the parties have vested in the Court compulsory jurisdiction in relation to a treaty it would seem that a decision given in proceedings between any of them must be binding upon all of them, Article 59 and the second paragraph of Article 63 of the Statute notwithstanding. All of them have full opportunity of intervening under Article 63 of the Statute if they so desire; in view of their acceptance of compulsory jurisdiction their position is fundamentally different from that with reference to which Article 63 was originally drafted; and it would not seem reasonable that it should be possible for them to retain a right to challenge the Court's decision by the simple expedient of abstaining from intervening. Acceptance of such a doctrine would defeat almost completely the purpose of the innumerable treaty provisions in virtue of which the Court has been entrusted with the function of ensuring uniformity in the interpretation of multipartite instruments. Furthermore, the probability that the Permanent Court itself will take the view here advanced is greatly strengthened by the fact that, despite the provisions of Article 59 of the Statute, the Court has already tended to regard its previous decisions as precedents, even in cases in respect of which no such line of reasoning applies.[1] It is therefore submitted that in cases falling in this second group the Court's decision is binding upon Great Britain. It is clear that there should be included in this second group cases in which Great Britain has accepted the compulsory jurisdiction of the Court in respect of the treaty under consideration, not by the terms of that treaty itself, but by the terms of some other treaty expressly conferring such jurisdiction in respect of the treaty under consideration.[2]

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[1] e.g. *German Interests in Polish Upper Silesia* (*Merits*) case, *P.C.I.J.*, Series A, No. 17, p. 31; *Chorzow Factory Indemnity* (*Merits*) case, *ibid.*, p. 37; *Jurisdiction of the European Commission of the Danube* case, *P.C.I.J.*, Series B, No. 14, p. 36; *Interpretation of the Greco-Turkish Agreement of December 1st, 1926*, case, *P.C.I.J.*, Series A/B, No. 44, pp. 24, 25, 28, 30. For further references see *Annual Digest*, *1925–6*, Case No. 329, and *1927–8*, Case No. 355. For a discussion of this tendency see H. Lauterpacht, "The So-Called Anglo-American and Continental Schools of Thought in International Law", in *British Year Book of International Law*, Vol. XII, 1931, especially at pp. 52–62, and *The Development of International Law by the Permanent Court of International Justice*, at pp. 4–12; M. O. Hudson, *The Permanent Court of International Justice*, pp. 538–40; and W. E. Beckett, "Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour Permanente de Justice Internationale" in Hague *Recueil des Cours*, 1932 (I), especially at p. 141.

[2] e.g. Article 37 of the Constitution of the International Labour Organization with

(*c*) The decision may have been given in a case in which Great Britain (i) is a party to the treaty under consideration but in which (ii) she was not an original party to the case and did not intervene, and in which (iii) neither the treaty under consideration, nor any other treaty expressly referring to it to which Great Britain is a party, vests in the Court compulsory jurisdiction in relation to the treaty under consideration. In such cases the Court's decision, though of strong persuasive authority for the purpose of determining Great Britain's obligations under the treaty, is not binding upon Great Britain. These are the cases to which Article 59 of the Statute of the Court and the *ex contrario* argument from the second paragraph of Article 63 are unquestionably applicable.

9. A Permanent Court decision which is not binding upon Great Britain as an international person cannot be regarded as binding upon an English court. Decisions falling into the third of the three groups distinguished above can therefore never be of more than persuasive authority in an English court, though as persuasive authorities they will rank highly. If the view stated above as to the extent to which decisions falling in the second group are binding upon Great Britain as an international person is not accepted, then doubtless the position will be the same in respect of decisions falling in that group. Whether the view stated above is correct is a question which can only be settled in the last resort by the Permanent Court itself.

10. In any case in which a Permanent Court decision relating to a treaty is binding upon Great Britain as an international person (i.e. in cases falling in the first group above, without question, and also, it is submitted, in cases falling in the second group) failure to respect that decision by an English court will involve the international responsibility of Great Britain. If an English court denies a treaty to be applicable in circumstances in which the Permanent Court has regarded it as applicable, or asserts it to be applicable in circumstances in which the Permanent Court regards it as inapplicable, or places upon it an interpretation differing from that placed upon it by the Permanent Court, Great Britain will incur international responsibility for the resulting failure to perform her international obligations. It would not

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reference to international labour conventions; cf. the Protocol for conferring on the Permanent Court of International Justice Competence to Interpret the Hague Conventions on Private International Law, 1931 (Hudson, *International Legislation*, Vol. V, pp. 933–4). Great Britain is not a party to this Protocol or the Hague Conventions.

appear to be any longer necessary to establish this proposition by any lengthy argument. Certain aspects of the law of responsibility were under consideration at the Conference for the Codification of International Law which met at The Hague in 1930, and though no agreement upon the question of responsibility was reached at that Conference, the preliminary exchanges of views and the discussions of the Conference brought out clearly the view taken by the British Government of the law upon the subject, and also made it clear that the British view meets with a substantial measure of acceptance from other countries. In its reply to a questionnaire circulated on behalf of the Preparatory Committee for the Conference the British Government stated that "If the decisions of the courts are inconsistent with the treaty obligations or the international duties of the state, the state is responsible".[1] The Preparatory Committee[2] adopted the same view and formulated for the Conference a basis of discussion declaring that a state is responsible if "a judicial decision which is final and without appeal is incompatible with the treaty obligations of the state".[3] At the Conference the British Delegation proposed an amendment to this basis of discussion, the effect of which was that a state would be declared responsible in respect of "a decision of its courts which, being final and without appeal, is incompatible with a treaty obligation or other rule of international law".[4] The text adopted at first reading by the competent committee of the Conference was not dissimilar. It declared states responsible in cases in which "a judicial decision, which is not subject to appeal, is clearly incompatible with the international obligations of the state".[5] The matter did not proceed any further, but the passages quoted above make it clear what the accepted principle is. It is immaterial that they are all limited in scope by their contexts to the responsibility of states for damage caused in their territory to the person or property of foreigners. This was the only aspect of the question which the Codification Conference had before it, but the same general principles govern other aspects of state responsibility. The principle would not seem to be formulated too widely if expressed in the following terms: Any decision by an English court which is in conflict with a Permanent Court decision binding upon Great Britain will, except perhaps in the event of its remaining a merely academic pronouncement devoid of any practical effect,[1] involve the international responsibility of Great Britain.

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[1] Conference for the Codification of International Law. Bases of Discussion, Vol. III, League of Nations Document C. 75, M. 69, 1929, V, at p. 201, IV, 2.

[2] Basdevant, Castro-Ruiz, François, Sir Cecil Hurst, and Pilotti.

[3] Conference for the Codification of International Law. Bases of Discussion, Vol. III, League of Nations Document C. 75, M. 69, 1929, V, at p. 48, Basis of Discussion No. 5 (2).

[4] Acts of the Conference for the Codification of International Law, Meeting of the Committees, Vol. IV, Minutes of the Third Committee, League of Nations Document, C. 351 (c), M. 145 (c), 1930, V, at p. 216.

[5] *Ibid.*, p. 23, Article 9 (1).

11. Now English law recognizes a considerable number of cases in which the presence in the case of an international element precludes the court from exercising the same freedom of judgment as it would be entitled to exercise in a case in which no such international element was present. In many such cases a statement made by or on behalf of the Crown is conclusive and binds the court. Among statements of this kind which are conclusive may be mentioned: (*a*) statements as regards the sovereign status of a foreign state[2] or a foreign monarch;[3] (*b*) statements as regards the recognition, *de facto* or *de jure*, of a foreign state[4] or a foreign government[5] or a conquest of territory by a foreign state;[6] (*c*) statements on the question whether certain territory is under the sovereignty of one foreign state or another;[7] (*d*) statements on the question whether a certain place is within the territorial jurisdiction of the Crown;[8] (*e*) statements as to the existence of any jurisdiction of the Crown in a foreign country;[9] (*f*) statements as regards the commencement and termination of a state of war against another country;[10] (*g*) statements as regards the existence of a case for reprisals in maritime warfare;[11] and (*h*) statements as to whether or not a particular person is entitled to diplomatic privilege.[12] Different judges have formulated in different language

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[1] Cf. *The Mavrommatis* case, *P.C.I.J.*, Series A, pp. 40–5.

[2] *Duff Development Co.* v. *Kelantan Government*, [1924] A.C. 794, at pp. 805, 813, 820, 822–8, and 830.

[3] *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149, at pp. 153 and 158.

[4] *Taylor* v. *Barclay*, 2 Sim. 213, at p. 220; *The Gagara*, [1919] P. 95, at p. 102; *The Annette*, [1919] P. 105, at p. 111.

[5] *A. M. Luther Co.* v. *Sagor and Co.*, [1921] 3 K.B. 532, at pp. 548 and 556; *Banco de Bilbao* v. *Sancha*, [1938] 2 K.B. 176, at p. 195; *The Arantzazu Mendi*, [1938] P. 233, at p. 241.

[6] *Bank of Ethiopia* v. *National Bank of Egypt and Liguori*, [1937] 1 Ch. 513, at p. 519; *Haile Selassie* v. *Cable and Wireless*, [1938] 1 Ch. 545.

[7] *Foster* v. *Globe Venture Syndicate, Ltd.*, [1900] 1 Ch.D. 811, at p. 814.

[8] *The Fagernes*, [1927] P. 311, at pp. 319, 323, 324, and 330.

[9] Foreign Jurisdiction Act, 1890 (53–54 Vict. c. 37), Section 4, and *The North Charterland Exploration Co.* (*1910*), *Ltd.* v. *King*, [1931] 1 Ch., at p. 184.

[10] *Janson* v. *Dreifontein Consolidated Mines*, [1902] A.C., at p. 500.

[11] *The Zamora*, [1916] 2 A.C., at p. 98; *The Stigstad*, [1919] A.C., at p. 285.

[12] *The Parlement Belge*, 5 P.D. 197, at p. 199; *In re Suarez*, [1918] 1 Ch. 176, at pp. 195

the grounds upon which such statements are conclusive, but as to the underlying principle there appears to be a broad measure of agreement. This principle was formulated by Vice-Chancellor Shadwell in the maxim that, in relation to international matters, "Sound policy requires that the Courts of the King should act in agreement with the Government of the King".[1] In recent years Dr. A. D. McNair has expressed the same thought in the sentence "It is an axiom in international relations that a sovereign state cannot speak with two voices".[2] Doubtless this principle requires some qualification in that even to-day the courts are entitled in certain circumstances to refuse to acknowledge the validity of action taken by the executive on the ground that such action is contrary to international law.[3] Doubtless also a further development of the possibility of judicial review of executive action, and even of legislation, which is alleged to be inconsistent with international obligations, would contribute powerfully to the establishment of a more closely integrated international community.[4] But that the Courts of the King should not differ from the Government of the King as regards international matters except in deference to international law appears to be an unchallengeable proposition.[5] It follows that, putting the matter at the lowest estimate, if a statement were made to an English court on behalf of the Crown stating that Great Britain was bound internationally by a decision of the Permanent Court of International Justice relating to a treaty, the English court ought to conclude from that statement that the decision in question must be accepted by it as a binding authority upon the international questions decided by the Permanent Court. Otherwise the Court of the King would violate the requirement of sound policy that it should act in agreement with the Government of the King in relation to international matters, and Great Britain would incur international

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and 199; *Engelke* v. *Musmann*, [1928] A.C. 433, at pp. 436, 443, 446, 451, 457. For the issues of principle involved in the last of these cases see Sir Cecil Hurst, "Diplomatic Immunities—Modern Developments" in *British Year Book of International Law*, 1929, pp. 1–13.

[1] *Taylor* v. *Barclay*, 2 Sim., at p. 221.

[2] "Judicial Recognition of States and Governments and the Immunity of Public Ships" in *British Year Book of International Law*, 1921–2, at p. 65.

[3] *The Zamora*, [1916] 2 A.C., at p. 90 and following.

[4] For discussion of this as a possible line of development see C. W. Jenks, "The Proposed Peace Act" in *Transactions of the Grotius Society*, Vol. XXI, 1935, especially at pp. 11–12.

[5] The same principle applies in the United States. See Pergler, *Judicial Interpretation of International Law in the United States*, pp. 41–8, 57, 71–2, 101, 107, 171–3, 175, and 191–3.

responsibility in consequence of its decision. It would seem undesirable, however, that the court should apply to the executive for information as to whether a decision of the Permanent Court is binding upon Great Britain. In the cases referred to above a statement by the Crown is frequently necessary to resolve doubts as to questions of fact bearing upon the international policy of Great Britain. The status of a decision of the Permanent Court of International Justice is a question of law and as such should be determined by the English court without reference to the Crown. The principle that "the Courts of the King should act in unison with the Government of the King" in international matters has often been acted upon by the courts without specific reference to the executive, notably by Lord Eldon in recognition cases.[1] Further, this principle is qualified in this type of case by the rule that an English court is not bound by a denial by the executive of the existence of an international obligation,[2] a rule which follows from the fact that the Crown cannot alter the rules of international law applicable by the court any more than it can alter any other part of the law of the land.[3] It would therefore seem that the principle should be formulated, with reference to the subject under discussion, in the following terms: The conduct of foreign affairs is within the prerogative of the Crown. That prerogative includes the right to accept the jurisdiction of international tribunals, with the effect of making their decisions binding upon Great Britain. When the Crown has exercised its prerogative with this effect, an English court is bound by the result just as it is bound by the action of the Crown in recognizing a foreign state or government, or recognizing the acquisition of territory by a foreign state, or granting diplomatic privilege. The question whether Great Britain is bound by a Permanent Court decision is a question of law and is therefore primarily one to be determined by the English court rather than by the Crown.

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[1] For which see P. L. Bushe-Fox, "The Court of Chancery and Recognition, 1804–31", in *British Year Book of International Law*, Vol. XII, 1931, at pp. 63–75. Bushe-Fox criticises the conclusions drawn by Lord Eldon as to the effect of non-recognition upon private rights, but not the fundamental principle.

[2] *Campbell* v. *Hall* (1774), 1 Cowp., at p. 208, the third proposition; *Amodu Tijani* v. *Secretary, Southern Nigeria*, [1922] 1 A.C., at p. 407.

[3] *The Lucy* (1809), Edw. 122; *Northcote* v. *Douglas–The Franciska* (1855), X Moore 37; *The Zamora*, [1916] 2 A.C., at p. 90. There should be distinguished from this rule (*a*) the rule that a subject cannot enforce a treaty against the Crown in the courts (*Rustomjee* v. *The Queen* (1876), 1 Q.B.D. 487; 2 Q.B.D. 69, and *Civilian War Claimants Association, Ltd.* v. *The King*, [1932] A.C. 14); and (*b*) the rule that no action will lie in an English court for an act of state (*Buron* v. *Denman* (1848), 2 Ex. 167, and *In Re Ferdinand, Ex-Tsar of Bulgaria*, [1921] 1 Ch., at p. 139). For act of state see E. C. S. Wade, "Act of State in English Law: Its Relations with International Law", in *British Year Book of International Law*, Vol. XV, 1934, pp. 98–112.

12. The fact that the right to accept the jurisdiction of international tribunals is included within the prerogative of the Crown brings the contention that Permanent Court decisions relating to treaties are, in the circumstances under discussion, binding upon English courts, within the principle underlying another well-established rule of English law. The rule that a treaty bringing about a mitigation of belligerent rights will be enforced by the courts irrespective of any statutory sanction has been constantly acted upon,[1] though no English court appears to have explained the principle underlying it. This principle is believed[2] to be, however, that as the Crown wages war under the prerogative it may, without statutory authority, bind itself by treaties with regard to the conduct of war with the effect of making such treaties binding upon the courts. The same principle would appear to cover the acceptance by the Crown of an obligation to abide by an international judicial decision relating to a treaty. By English law "the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone".[3] But if the Crown alone has authority to enter into treaty obligations, or to agree to terminate or vary them, it would seem that it must equally have unlimited authority to make, expressly or tacitly, an agreement with another state determining the nature and extent of Great Britain's obligations under treaties to which both are parties. Such an agreement would appear to be conclusive in an English court as to questions settled by it, and there is at least one decision of Lord Stowell to this effect.[4] If, however, an agreement entered into by the Crown, determining directly the nature and extent of Great Britain's obligations under treaties, is conclusive in an English court, it would seem to follow that an international determination of such matters made in virtue of an agreement entered into by the Crown must be equally conclusive.

13. A further basis for the view that an English court should regard itself as bound by a Permanent Court decision relating to a treaty which is binding upon Great Britain as an international person is suggested by the rule that there is a presumption against

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[1] See the cases cited by A. D. McNair, *The Law of Treaties*, at p. 19, and in *British Year Book of International Law*, 1928, at p. 64.

[2] See A. D. McNair, *The Law of Treaties*, at pp. 18–19.

[3] *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1937] A.C., at p. 348.

[4] *The Neptune* (1807), 6 C. Rob., at p. 407.

any intention on the part of the legislature to enact provisions which would involve a violation of international law or of a treaty obligation. That such a presumption exists is a well-established rule of statutory construction.[1] The basis of the presumption is the fact that the courts recognize that it is incumbent upon the legislature to respect international law and obligations. The courts do not claim any right to restrain the legislature if the latter has clearly intended to disregard an international obligation,[2] but they will not impute such an intention to it in doubtful cases. Now courts which acknowledge that the legislature, which they regard as sovereign, is under a duty, albeit one which they cannot enforce, to respect international law and obligations, can hardly deny that they themselves are under the same duty in respect of matters within their discretion. The power of English courts to ensure the conformity of their own decisions with Permanent Court decisions binding upon Great Britain which relate to treaties would not appear to be subject to any limitation equivalent to their obligation to apply statutes inconsistent with international law. Their power being thus unqualified, their duty would appear to be absolute, just as the duty of the legislature to respect international law and obligations is absolute though no municipal agency can enforce performance of it.

14. It is no doubt desirable, in order to avoid misunderstanding, to explain the relation between (*a*) the view contended for above as to the authority in English courts of Permanent Court decisions relating to treaties, and (*b*) certain well-established rules of English law as to the effect of treaties at municipal law. There is, of course, no question that "Within the British Empire there is a well established rule that the making of a treaty is an executive act, while the performance of its obligations if they entail alteration of the existing domestic law, requires legislative action", with the result that "the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law". [3] It is equally well established that the

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[1] *Le Louis* (1817), 2 Dods., at p. 254; *Madrazo* v. *Willes* (1820), 3 B. and Ald., at pp. 357 and 358; *The Zolleverein* (1856), Swab., at p. 98; *Cope* v. *Doherty* (1858), 4 K. and J., at p. 374; *The Annapolis* (1861), Lush., at p. 306; *Cail* v. *Papayanni—The Amelia* (1863), 1 Moore N.S., at p. 474; *Niboyet* v. *Niboyet* (1878), 4 P.D., at p. 19; *Ex parte Blain* (1828), 12 Ch. D., at p. 527; *Bloxom* v. *Favre* (1883), 8 P.D., at p. 107; *Colquhoon* v. *Brooks* (1888), 21 Q.B.D., at p. 57.

[2] *The "Johannes"* (1860), Lush., at p. 187; *Cail* v. *Papayanni—The Amelia* (1863), 1 Moore N.S., at p. 473; *Mortensen* v. *Peters* (1906), 8 Session Cases 93; *Croft* v. *Dunphy*, [1933] A.C., at p. 164.

[3] *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1937] A.C., at p. 347;

Crown cannot be presumed to have acted, when entering into a treaty, as an agent or trustee for its subjects in such a manner as to give them rights under the treaty enforceable against it in an English court.[1] Nor can another state with which the Crown has contracted be regarded as having acted as an agent or trustee for its subjects in such a manner as to give those subjects a right against the Crown enforceable in an English court.[2] The proposition contended for above is not, however, that if the Permanent Court of International Justice holds that a treaty is binding upon Great Britain as an international person, then an English court must give effect to the provisions of that treaty as English municipal law, irrespective of whether or not the steps required by English law to make it municipally effective have been taken. The proposition is simply that the decision of the Permanent Court should be accepted by the English court as a binding authority upon the point decided by the Permanent Court. This point will generally be one of international law,[3] such as whether the treaty is internationally binding, when it came into force or ceased to be in force, its correct interpretation as an international instrument, or some suchlike issue. Upon points of this kind an English court can accept a Permanent Court decision as authority without violating any rule of English law.

15. English courts frequently have occasion to consider the interpretation to be placed on treaty provisions. It has occasionally been suggested before them that the interpretation of

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see also *The Parlement Belge* (1879), 4 P.D., at p. 154, *In re Californian Fig Syrup Company's Trade Mark* (1888), 40 Ch. D. 620; *Walker* v. *Baird* (1892), A.C., at p. 479; and *Re Arrow River and Tributaries Slide and Boom Co. Ltd.*, [1932] 2 D.L.R. 250, and *Annual Digest 1931–1932*, Case No. 2; and see Holland, *Studies in International Law*, pp. 190–3; Maitland, *The Constitutional History of England*, pp. 424–6; Anson, *Law and Custom of the Constitution*, Vol. II, Part II, pp. 102–10; Westlake, *Collected Papers*, pp. 499–500 and 507; Picciotto, *The Relation of International Law to the Law of England and America*, pp. 59–74; A. D. McNair, *The Law of Treaties*, at pp. 7–24, and "When do British Treaties involve Legislation?" in *British Year Book of International Law*, 1928, at pp. 59–68.

[1] *Rustomjee* v. *The Queen* (1876), 1 Q.B.D. 487; *Civilian War Claimants Association* v. *The King*, [1932] A.C. 14.

[2] *Administrator of German Property* v. *Knoop*, [1933] 1 Ch. 439.

[3] It is true that the Court sometimes has to decide questions of municipal law, and might have to consider the effect under English municipal law of a treaty internationally binding upon Great Britain. Upon such a point, however, it would be bound by English law as settled by the decisions of English courts. See *P.C.I.J.*, Series A, Nos. 20/21, at pp. 96 and 124; and see C. W. Jenks, "The Interpretation and Application of Municipal Law by the Permanent Court of International Justice" in *British Year Book of International Law*, 1928, pp. 92–5.

treaties lies outside their competence,[1] but it does not appear that such a suggestion has ever been accepted by an English court. In practice they have frequently interpreted treaty provisions, and in one case[2] an English court expressly affirmed its duty to interpret an international instrument which had been given the force of municipal law in Great Britain. There is, however, some evidence in the reports[3] that an English court will refrain from interpreting an international instrument if it can dispose of a case on a point of municipal law.[4] In many cases the instrument which the court is called upon to interpret is the treaty itself, or some national enactment or regulation in which its terms have been incorporated, either textually or by reference, and not merely some national enactment or regulation in connexion with the interpretation of which the terms of the treaty may be indirectly relevant. Cases of this type have often arisen in consequence of the rule that legislation is not required to give the effect of law in an English court to treaties whereby the Crown enters into obligations as to the exercise of its belligerent rights. Numerous decisions have been given upon the interpretation of the treaties relating to maritime warfare in force during the eighteenth century and Napoleonic Wars,[5] and the interpretation of the Declaration of Paris[6] and The Hague Conventions of 1899 and 1907.[7] Treaty provisions have also called for interpretation in consequence of the rule "that international law regards a state as being invested for international purposes with complete power—*vis-à-vis* another contracting party—to alienate and otherwise affect the rights of its nationals",[8] thus defeating rights which could otherwise be asserted in prize proceedings.[1] The interpretation of treaties by English courts has not, however, been restricted to prize cases and matters analogous thereto. English courts have been called upon to interpret treaties for the purpose of determining the law applicable in places where Great Britain has held extra-territorial rights.[2] The procedure whereby extradition treaties are embodied in Orders in Council made under the Extradition Act[3] may result in it being necessary for an English court to consider the interpretation of an extradition treaty.[4] The procedure adopted after the war of 1914–18 of giving, by virtue of Orders in Council made under the Treaty of Peace Acts,[5] statutory force to the provisions of the peace treaties relating to enemy property, has resulted in a series of cases involving the interpretation of those provisions coming before English courts.[6] The relatively new device of scheduling the terms of a treaty to a statute and providing by the statute that the provisions of the treaty shall have the force of law[7] has already been the occasion of questions of treaty interpretation coming before the courts.[8] Cases of this last type must be expected to be increasingly common in the future, for it seems probable that the practice of scheduling the text of a convention to a statute and giving it the force of law will often be found to be the most convenient method of giving effect to multipartite conventions of a legislative character. In the cases of Canada and Australia questions involving the interpretation of treaties have been relevant to the determination of the extent of the legislative authority of the Dominion[9] and Commonwealth[10] respectively. It is submitted that in the above classes of case, and in any others which may be analogous to them, an English court should henceforth accept as a conclusive authority upon the interpretation of a treaty any Permanent Court decision relating to that treaty which is binding upon Great Britain as an international person. The fact that it would be inappropriate, merely because a treaty has been given the force of law in Great Britain, to attempt to interpret it on the basis of rules of construction peculiar to English law, already appears to have met with some recognition in English courts.[1] It is but a stage further in the argument to admit that, on the grounds indicated earlier in this article, an English court should in the cases under discussion accept as conclusive a Permanent Court decision. The position is slightly more complicated where the interpretation of a treaty is not directly before the court, but is relevant to the interpretation of a statute which embodies the treaty in a schedule but does not give it or any of its provisions the force of law.[2] Questions have been suggested in English courts as to the extent to which in such circumstances it is permissible to look at the treaty for the purpose of interpreting the statute.[3] These are questions of municipal law in regard to which a Permanent Court decision interpreting the treaty would be irrelevant, but assuming it to be decided that an English court is in certain cases entitled to look at the treaty it would seem that it should then accept as conclusive any Permanent Court interpretation of the treaty which is binding upon Great Britain as an international person.

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[1] *Stoeck* v. *Public Trustee*, [1921] 2 Ch., at p. 68; *Administrator of German Property* v. *Knoop*, [1933] 1 Ch., at p. 448.

[2] *Stoeck* v. *Public Trustee*, [1921] 2 Ch., at p. 71.

[3] e.g. *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1937] A.C., at pp. 348–9. Cf. also *The Gutenfels*, [1916] 2 A.C., at p. 119, and *In re the Regulation and Control of Aeronautics in Canada*, [1932] A.C., at p. 66.

[4] Much as the Permanent Court of International Justice will refrain from considering a point of municipal law if it can dispose of a case on a point of international law. See C. W. Jenks, "The Interpretation and Application of Municipal Law by the Permanent Court of International Justice" in *British Year Book of International Law*, Vol. XIX, 1938, at p. 76.

[5] e.g. *The Vryherd* (1778), Hay and Marriott 188; *The Ringende Jacob* (1798), 1 C. Rob. 89; *The Twendre Brodre* (1801), 4 C. Rob. 33; *The Apollo* (1802), 4 C. Rob. 158.

[6] e.g. *The Marie Glaeser*, [1914] P. 218, 233; *The Miramichi*, [1915] P. 71, 82; *The Dirigo*, [1919] P. 204, 219.

[7] *The Möwe*, [1915] P., at p. 15; *Porter* v. *Freudenberg*, [1915] 1 K.B., at pp. 874–80; *The Germania*, [1917] A.C. 375; *Procurator in Egypt* v. *Deutsches Kohlen Depot Gesellschaft*, [1919] A.C. 291, 300.

[8] A. D. McNair, *The Law of Treaties*, at p. 335.

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[1] *The Bathori*, [1933] P. 22, 37. But this decision was upheld by the Privy Council upon another ground, [1934] A.C. 91.

[2] *Maltass* v. *Maltass*, 1 Rob. *Ecc.* 67; *Imperial Japanese Government* v. *P. and O. Co. Ltd.*, [1895] A.C. 644.

[3] 33 & 34 Vict. c. 52, s. 2.

[4] *Reg* v. *Wilson* (1877), 3 Q.B.D. 42; *Rex* v. *Corrigan*, [1931] 1 K.B. 527.

[5] 9 & 10 Geo. V, c. 33; 10 & 11 Geo. V, c. 6; 11 & 12 Geo. V, c. 11, and 14 & 15 Geo. V, c. 7.

[6] e.g. *Stoeck* v. *Public Trustee*, [1921] 2 Ch. 68; *Rothschild* v. *Administrator of Austrian Property*, [1923] 2 Ch. 542; *Kramer* v. *Attorney-General*, [1923] A.C. 528; *Bohemian Union Bank* v. *Administrator of Austrian Property*, [1927] 2 Ch. 175; *Administrator of German Property* v. *Knoop*, [1933] 1 Ch. 439; *Whittall* v. *Administrator of German Property*, 15 B.Y. I.L. 15 (1934), 180; *The Bathori*, [1934] A.C. 91.

[7] e.g. Carriage by Air Act, 1932 (22 & 23 Geo. V, c. 36), section 1.

[8] e.g. *Grein* v. *Imperial Airways*, [1937] 1 K.B. 50; *Westminster Bank Ltd.* v. *Imperial Airways*, 52 T.L.R. 607; *Philippson* v. *Imperial Airways*, [1938] W.N. 115.

[9] *In re Legislative Jurisdiction over Hours of Labour*, [1925] Can. S.C.R. 505; *In re the Regulation and Control of Aeronautics in Canada*, [1932] A.C. 304; *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1937] A.C. 326.

[10] *The King* v. *Burgess: Ex Parte Henry*, [1936] 55 C.L.R. 608.

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[1] See, for instance, the judgment of Greene L.J. in *Grein* v. *Imperial Airways*, [1937] 1 K.B. 50, 74, and comment thereupon by R. Y. Jennings in *Journal of Comparative Legislation and International Law*, Vol. XX, 1938, pp. 124–6. See also some observations on this subject with reference to international labour conventions in *P.C.I.J.*, Series C, No. 60, at pp. 172–3 and 209–10.

[2] e.g. *Merchant Shipping* (*International Labour Conventions*) *Act*, 1925 (15 & 16 Geo. V, c. 42).

[3] *The Croxteth Hall*, [1930] P. 197, and the same case on appeal to the House of Lords as *Ellerman Lines Ltd.* v. *Murray*, [1931] A.C. 126. See also *Barras* v. *Aberdeen Steam Trawling Co. Ltd.*, [1933] A.C. 402. For comment upon these decisions see A. D. McNair, "The Application of International Labour Conventions" in *British Year Book of International Law*, Vol. XIII, 1932, pp. 120–2, and in *Annual Digest of Public International Law Cases, 1929–1930*, at p. 345. In *Annual Digest, 1929–1930*, "the practice of scheduling the treaty to the statute which was followed in this case" is described as having been "uniform in the case of such International Labour Conventions as, having been adopted by the United Kingdom, have required legislation for their enforcement". The Merchant Shipping (International Labour Conventions) Act, 1925, is, however, the only statute which schedules a convention without specifically giving the force of law to any of its provisions. The manner in which the Unemployment Indemnity (Shipwreck) Convention, 1920, and the Medical Examination of Young Persons (Sea) Convention, 1920, are scheduled to the Merchant Shipping (International Labour Conventions) Act should be contrasted (*a*) with the reference in section 2 (1) (*a*) (iii) of that Act to the rule 3 (*c*) of the Minimum Age (Sea) Convention, 1920, which is also scheduled, and (*b*) with the references to scheduled international labour conventions in the Employment of Women, Young Persons and Children Act, 1920 (10 & 11 Geo. V, c. 65), sections 1 and 4, and in the Hours of Employment (Conventions) Act, 1936 (26 Geo. V, and 1 Edw. VIII, c. 22), sections 1 and 3 (6).

16. Matters of interpretation are not, however, the only international points relating to a treaty which may come before an English court. English courts have been called upon, in a variety of connexions, to decide or advert to points such as (*a*) the date of the taking effect of a treaty,[1] (*b*) the effect of a reservation,[2] (*c*) the question whether a treaty containing some restriction upon its applicability, such as the general participation clause in The Hague Conventions of 1899 and 1907, is in force as regards particular facts,[3] (*d*) the effect of a treaty upon third parties,[4] (*e*) the effect of an internal change in the system of government upon a treaty,[5] (*f*) the implied abrogation of a treaty by a later treaty,[6] and (*g*) the effect of war upon treaties of various types.[7] Other points of a similar character which might at any time come before English courts are suggested by American cases relating to (*a*) state succession in respect of treaty obligations,[8] and (*b*) the exercise by one state of the right to annul a treaty on the ground of a breach of its provisions by the other party.[9] In respect of all matters of this description an English court ought, it is submitted, to accept as a conclusive authority a Permanent Court decision which is binding upon Great Britain as an international person and relates to the treaty in question before the English court.

III. *The Principles applicable when the Permanent Court Decision relates to Customary International Law*

17. Cases in which a Permanent Court decision relating to customary international law is binding upon Great Britain as an

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[1] *The Elsebe* (1804), 5 C. Rob. 173, 191; *The Eliza Ann and Others* (1813), 1 Dods. 244, 248; *Kotzias* v. *Tyser*, [1920] 2 K.B. 69, 77; and see J. Mervyn Jones, "The Retroactive Effect of the Ratification of Treaties", in *American Journal of International Law*, Vol. XXIX, 1935, pp. 51–65.

[2] *The Chile*, [1914] P. 218, 220.

[3] *The Blonde*, [1922] 1 A.C. 313, 320–5.

[4] *The Jonge Josias* (1809), Edwards 128; *The Frau Ilsabe* (1801), 4 C. Rob. 64.

[5] *Lazard Bros. & Co.* v. *Midland Bank*, [1933] A.C. 289, 307.

[6] *The Franciska* (1855), Spinks, 287.

[7] *The Frau Isalbe* (1801), 4 C. Rob. 64; *Le Louis* (1817), 2 Dods. 210, 258; *Sutton* v. *Sutton*, 1 Russell and Mylne, 663, 675.

[8] *Terlinden* v. *Ames*, [1902] 184 U.S. 270, 22 S. Ct. 484; *Flensburger Dampfercompagnie* v. *United States* (1932), *Annual Digest, 1931–1932*, p. 74.

[9] *Hooper* v. *United States* (1887), 22 Court of Claims, 408.

international person are likely to be less frequent than binding cases relating to treaties. In relation to treaties, Permanent Court decisions have a finality which they can never hope to have in relation to customary law. It is notorious that the English doctrine of the binding authority of precedents does not apply to the Permanent Court,[1] and although the range of questions of customary international law which may arise in English courts is very wide,[2] the probability that the actual point decided by the Permanent Court in a case to which Great Britain was a party will subsequently arise in an English court appears to be far slighter in respect of customary international law than in respect of treaties. Nor is it clear, as regards questions of customary law, that even the parties to a particular case are strictly bound by the law as formulated by the Permanent Court in that case, as distinct from conclusions as to their respective liabilities reached by the Court on the basis of the law as so formulated.[3] The Court determines treaty points in virtue of the provisions of instruments which have given it a general power to determine the interpretation and effect of the treaties to which they relate. In accordance with general principles its decisions upon such points must be regarded as retroactive in operation and definitive for the future. In relation to questions of customary law the importance of the element of settling a particular dispute, as contrasted with that of determining the law as a body of rules of general application, appears to dominate in the function of the Court. In general, therefore, it would seem that only a *jurisprudence constante* of the Permanent Court should be regarded by an English court as of binding authority in relation to questions of customary law. Further, in evaluating the weight to be attached to particular decisions for the purpose of determining whether a *jurisprudence constante* exists, an English court would seem to be entitled to give considerable weight to the circumstances in which the decisions were given and to whether or not there was any considerable division of opinion in the Permanent Court. A case such as the

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[1] Article 59 of the Statute of the Permanent Court of International Justice. But see also footnote 1 on p. 11.

[2] For illustrations see Lauterpacht, "Decisions of Municipal Courts as a Source of International Law" in *British Year Book of International Law*, 1929, especially at pp. 67–75.

[3] See the *Polish Postal Service in Danzig* case, *P.C.I.J.*, Series B, No. 11, pp. 29–30; also the *Norwegian Claims* case, *Hague Court Reports*, Second Series, p. 39; and, more doubtfully, the *Alabama* case, Moore, *International Arbitrations*, Vol. I, pp. 653–82.

Lotus,[1] for instance, would be of poor authority. The Permanent Court of International Justice must be expected to have its cases of *Ship Money*[2] and its *Dred Scott* cases.[3] The fact that it is not bound by its own precedents will enable it to correct such cases in the future development of its own jurisprudence, but it would be unfortunate if they were to be regarded as being binding in the interval upon municipal courts. On the other hand, the circumstances of a case and the degree of unanimity shown by the Court may be such that a single decision can be regarded as finally settling the rule of international law upon the matter. In a case of this kind it would seem that an English court should regard such a decision as binding upon it, even if the decision does not formally bind Great Britain as an international person.[4]

18. Even in cases in which Permanent Court decisions are not binding, they would appear to be of the highest authority in English courts. It is well established in English law that international law is part of the law of the land and that the courts are under a duty to apply it as such,[5] but on more than one occasion English courts have alluded to the difficulty of obtaining satisfactory proof of the existence of a rule of international law. Thus

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[1] *P.C.I.J.*, Series A, No. 10. See the discussion of the extent to which the *Lotus* case can be regarded as of authority in Fischer Williams, *Chapters on Current International Law and the League of Nations*, pp. 209–31.

[2] *R.* v. *Hampden*, 3 State Trials, 825.

[3] *Dred Scott* v. *Sanford* (1857), 19 How., 393.

[4] Much as the Declaration of Paris is now regarded as having the force of customary international law. *The Marie Glaeser*, [1914] P. 218, 233.

[5] *Triquet and Others* v. *Bath*, 3 Burr. 1478; *Lockwood* v. *Coysgarne*, 3 Burr. 1676, 1678; *Heathfield* v. *Chilton*, 4 Burr. 2015, 2016; *Paling* v. *Atkins*, 3 Wilson 33; *Hopkins* v. *De Robeck*, 3 T.R. 79, 80; *Viveash* v. *Becker*, 3 M. and S., 284, 292, 298; *Novello* v. *Toogood*, 1 Barn. and Cress. 554, 562; *De Wütz* v. *Hendricks*, 2 Bing. 314, 315; *Service* v. *Castaneda*, 2 Coll. 56, 59; *De Haber* v. *Queen of Portugal*, 17 A. and E., N.S., 171, 207; *Magdalena Steam Navigation Co.* v. *Martin*, 2 E. and E. 94, 114; *Emperor of Austria* v. *Day*, 2 Giff. 628, 678; *Musurus Bey* v. *Gadban*, [1894] 2 Q.B. 352, 356, 361; *West Rand Central Gold Mining Co.* v. *The King*, [1905] 2 K.B. 391; *In re Suarez*, [1918] 1 Ch. 176, 192, 196; *Johnstone* v. *Pedlar*, [1921] 2 A.C. 262, 295. See also Lord Finlay in the *Lotus* case, *P.C.I.J.*, Series A, No. 10, p. 54. For a somewhat sceptical view of some of the older cases see E. D. Dickinson, "Changing Concepts and the Doctrine of Incorporation" in *American Journal of International Law*, Vol. XXVI, 1932, pp. 239–60; but see particularly the last paragraph of Professor Dickinson's article with reference to the possible implications of future changes in prevailing concepts. See also the weighty observations of Westlake in *Collected Papers*, at pp. 498–518, and of Maine in *International Law*, 1888 ed., at pp. 35–47. For a critical discussion of Oppenheim's well-known views on this subject see the 5th edition of Oppenheim's *International Law* by Lauterpacht, Vol. I, at pp. 34–43. For a discerning continental evaluation of the English position see Grassetti, *Diritto interno e diritto internazionale nell' ordinamento giuridico anglo-americano*.

in *West Rand Central Gold Mining Co. Ltd.* v. *The King*, Lord Alverstone said that:

> "There is an essential difference, as to certainty and definiteness, between municipal law and the system or body of rules in regard to international conduct, which, so far as it exists at all (and its existence is assumed by the phrase 'international law'), rests upon a consensus of civilised states, not expressed in any code or pact, nor possessing, in case of dispute, any authorised or authoritative interpreter; and capable, indeed, of proof, in the absence of some express international agreement, only by evidence of usage to be obtained from the action of nations in similar cases in the course of their history. It is obvious that, in respect of many questions that may arise, there will be room for difference of opinion as to whether such a consensus could be shown to exist."[1]

Later in the same judgment he remarked that:

> "It is quite true that whatever has received the common assent of civilised nations must have received the assent of our country. And that to which we have assented along with other nations in general may properly be called international law, and as such will be used and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised state would repudiate it."[2]

So also Lord Sankey, delivering judgment for the Judicial Committee in the *Piracy Jure Gentium* case, observed, in a passage which has already been quoted at length,[3] that "in embarking upon international law, their Lordships are to a great extent in the realm of opinion".[4] In respect of cases in which a Permanent Court decision covers the point which arises before an English court, all of the above statements now appear to require serious qualification. The "authorised or authoritative interpreter", to the absence of which Lord Alverstone alluded, now exists. It is no longer true that there is "room for difference of opinion, as to whether such a consensus could be shown to exist" as regards matters in respect of which there is a *jurisprudence constante* of the Permanent Court upon the subject, or even a single decision of unimpeachable authority. In view of the admission that it is "quite true that whatever has received the common consent of civilised nations must have received the assent of our country", a principle upon which the Permanent Court is accustomed to act must be regarded as having been assented to by Great Britain. Unequivocal acceptance of a principle by the Permanent Court would seem to be clear proof that that principle is "of such a nature, and has been so widely and generally accepted that it can hardly be supposed that any civilised state would repudiate it". The "wider range of authority" upon which the courts are permitted to act when the question for determination is one of international law clearly includes decisions of the Permanent Court of International Justice, and in so far as there are Permanent Court decisions of good authority upon the point at issue an English court ceases to be "to a great extent in the realm of opinion". On the contrary, in selecting "what appear to be the better views upon the question", an English court must clearly attach decisive weight to the decisions of the Permanent Court as the authorized and authoritative interpreter of international law. As Sir John Fischer Williams has expressed it, "The decisions and opinions, including perhaps the dissenting opinions, of the Permanent Court are the most important contemporary source of international law —*fontes juris gentium*".[1] In the light of this fundamental fact many of the dogmas of a quarter of a century ago may require revision.

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[1] [1905] 2 K.B. 391, 401.

[2] *Ibid.*, at pp. 406–7.

[3] p. 8, above.

[4] [1934] A.C. 586, 588.

19. The preceding observations are subject to the reservation, analogous to that already formulated in respect of treaties, that an English court will acknowledge and apply a rule of international law only "when legitimate occasion arises" for it "to decide questions to which doctrines of international law may be relevant".[2] As the law now stands[3] "Legislation of the Imperial Parliament, even in contravention of generally acknowledged principles of international law, is binding upon and must be enforced by the courts of this country, for in these courts the legislation of the Imperial Parliament cannot be challenged as *ultra vires*".[4] Likewise, the fact that international law acknowledges certain matters to be within British jurisdiction does not neces-

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[1] *Chapters on Current International Law and the League of Nations*, p. 230.

[2] *West Rand Central Gold Mining Co. Ltd.* v. *The King*, [1905] 2 K.B. 156, 164.

[3] Contrary to a widely accepted view, it would not seem impossible that Parliament should irrevocably renounce its power to bind the courts by such legislation in the future, as part of the process of the creation of a more effectively integrated international community. See C. W. Jenks, "The Proposed Peace Act", in *Transactions of the Grotius Society*, Vol. XXI, 1935, especially at pp. 11–21.

[4] *Croft* v. *Dunphy*, [1933] A.C. 156, 164; see also *R.* v. *Keyn*, *per* Cockburn C.J. (1876), 2 Ex. Div. 63, 160; *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.* (1877), 2 A.C. 394; and *Mortensen* v. *Peters* (1906), 8 Fraser, 93.

sarily imply that any particular English court has been vested by English law with the jurisdiction which Great Britain is entitled to exercise.[1]

IV. *The Authority of English Precedents as a Difficulty*

20. The question has hitherto been discussed upon the assumption that the Permanent Court decision invoked before an English court does not relate to a point upon which there already exists an English decision which, in the absence of any question as to the greater authority of the Permanent Court decision, would be binding upon the court before which the point has arisen. This further complication may arise in a number of forms, varying with the court before which the Permanent Court decision is invoked and the court which decided the earlier English case. The essential issue, however, is whether the House of Lords will regard a Permanent Court decision as (*a*) overruling an earlier House of Lords decision in the event of the Permanent Court decision being binding upon Great Britain as an international person, or (*b*) entitling the House of Lords to reconsider an earlier decision in a case in which a Permanent Court decision, without being binding upon Great Britain as an international person, is of strong persuasive authority. In order to answer this question adequately it would be necessary to consider at length the function of precedent in English law. Here it is impossible to do more than indicate a line of approach to the question. It appears from judicial expositions that precedents are to be followed "for the sake of attaining uniformity, consistency and certainty",[2] "for the interests of law as a science",[2] because of "the mischief which would result from" reversing decisions which have "made a law which men follow in their daily dealing" and thus become the basis of "the practice of mankind in conducting their affairs",[3] and because "occasional interference with what is perhaps abstract justice" is as nothing compared with "the inconvenience—the disastrous inconvenience—of having each question subject to being re-argued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real Final Court of Appeal".[4] None of these are convincing grounds

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[1] *R.* v. *Keyn* (1876), 2 Ex. D., 63.

[2] *Per* Parke J., *Mirehouse* v. *Rennell* (1833), 1 Cl. and F. 527, 546.

[3] *Per* Jessel M.R., *Ex p. Willey* (1883), 23 Ch.D. 118, 127.

[4] *Per* Earl of Halsbury L.C., *London Street Tramways Company* v. *London County Council* (1898), A.C. 375, 380.

for regarding a precedent as binding in the type of case under discussion. "Uniformity, consistency and certainty" in a national interpretation of international law can be bought too dearly at the price of the persistence of a cleavage between that national interpretation and international law as interpreted by the Permanent Court of International Justice. Certainly such a result is unlikely to promote "the interests of law as a science". Nor is the consideration that existing decisions have become the basis of the "practice of mankind in conducting their affairs" of any weight in international matters if there is a divergence between the national precedent and the view of the ultimate international authority. Still less is the difficulty, that if it were permissible to re-open questions "in fact there would be no real Final Court of Appeal", applicable in a case in which the gist of the matter is that the "real Final Court of Appeal" is not the House of Lords but the Permanent Court of International Justice. Any inconvenience which there may be in recognizing that, when there has been an intervening decision of the Permanent Court of International Justice, the doctrine of the binding authority of House of Lords decisions is subject to some qualification, would appear to be a slight matter "as compared with the inconvenience—the disastrous inconvenience" of perpetuating a divergence of view between the House of Lords and the Permanent Court. "Where it is clear that there is a mistake", Blackburn J. once said, "we are not bound to follow a previous case".[1] In relation to questions of treaties and international law it would seem to be sufficient proof that there has been a mistake that the Permanent Court of International Justice has taken a view of the matter differing from that of the House of Lords.

21. It is of interest that earlier decisions of English courts are not regarded as binding precedents upon questions of foreign law. With respect to foreign law "no earlier decision of the court can relieve the judge of the duty of deciding the question on the actual evidence given in the particular case".[2] It is true that the ground stated for this is that a question of foreign law "is a question of fact, of which the English court cannot take judicial cognisance, even though the foreign law has already been proved before it in another case",[3] whereas international law is applied by the courts

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[1] *Stourbridge Union* v. *Droitwich Union* (1871, 6 Q.B. 769, 775); see also C. K. Allen, *Law in the Making*, 2nd edition, p. 176.

[2] *Per* Lord Wright, *Lazard Bros. & Co.* v. *Midland Bank*, [1933] A.C. 289, 298. See also *M'Cormick* v. *Garnett* (1854), 5 de G.M. and G., 278.

[3] *Lazard Bros. & Co.* v. *Midland Bank*, [1933] A.C., at pp. 297–8.

as a part of the law of the land.[1] From this it follows that a question of foreign law admittedly does not come within the scope of the rule that "a decision of this House once given upon a point of law is conclusive upon this House afterwards",[2] whereas at first sight a question of international law would appear to do so. There is, however, some authority in the opposite sense. Thus Lord Alverstone said in the *West Rand* case that "the international law sought to be applied must, like anything else, *be proved by satisfactory evidence*",[3] which suggests that questions of international law may be outside the scope of the rule as to the conclusiveness of House of Lords decisions on points of law.[4] On closer examination the grounds for regarding questions of international law as being for the purpose of this rule upon the same footing as questions of foreign law appear to be very strong. "The world has not stood still between 1920 and 1930, least of all in the revolutionary ferment of Soviet Russia", observed Lord Wright[5] in refusing to follow earlier decisions on a question of Soviet law. This suggests that what is meant when a question of foreign law is described as a question of fact is that the court recognizes that it has no power to crystallize by its decisions the law of another country and must therefore in every new case hear fresh evidence as to what the law of that country has become. The same consideration applies in respect of questions relating to treaties and to international law. As regards treaties it is clear that no municipal decision can settle finally a question as to the effect or meaning of a treaty.[6] Nor can such a decision prevent the further evolution of customary international law. As was said by Lord Sankey, commenting upon the authority of *R.* v. *Joseph Dawson*[1] when delivering the opinion of the Judicial Committee *In re Piracy Jure Gentium*:

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[1] See the cases cited in footnote 5, on p. 25.

[2] *London Street Tramways Co.* v. *London County Council*, [1898] A.C. 375, 379.

[3] *West Rand Central Gold Mining Co. Ltd.* v. *The King*, [1905] 2 K.B. 391, 407, italics mine. Picciotto, *The Relation of International Law to the Law of England and America*, states emphatically (p. 104) that the existence of a rule of international law is a question of fact, like foreign law. Cf. also the discussion of "General Law and Special Law" in Salmond, *Jurisprudence*, 7th edition, at pp. 95–104.

[4] Cf. Lord Halsbury's suggestion that a decision based on ignorance of a statute would be vitiated by a mistake of fact. *London Street Tramways Co.* v. *London County Council*, [1898] A.C. 375, 380.

[5] *Lazard Bros. & Co.* v. *Midland Bank*, [1933] A.C. 289, 299.

[6] The law upon the matter appears to have been correctly stated in the following extract from a dispatch of the year 1927 from a British Embassy to the Ministry of Foreign Affairs of a foreign Power: "While His Majesty's Government is prepared to acquiesce in your ruling that in matters affecting private rights the interpretation of diplomatic conventions to which the Government is a party must be left so far as the . . . Government is concerned to the law courts, His Majesty's Government cannot accept the findings of these . . . courts on such a question as being binding upon them. The interpretation of a treaty between two governments is not a matter in which the decisions of the courts of one party are binding on the other." (Quoted by A. D.

> "But over and above that we are not now in the year 1696, we are now in the year 1934. International law was not crystallised in the seventeenth century, but is a living and expanding code. In his Treatise on International Law, the English textbook writer Hall (1835–1894) says at p. 25 of his preface to the third edition (1898): 'Looking back over the last couple of centuries we see international law at the close of each 50 years in a more solid position than that which it occupied at the beginning of the period. Progressively it has taken firmer hold. It has extended its sphere of operation, it has ceased to trouble itself about trivial formalities, it has more and more dared to grapple in detail with the fundamental facts in the relations of states. The area within which it reigns beyond dispute has in that time been infinitely enlarged and it has been greatly enlarged within the memory of living man.'"[2]

It thus appears that, in respect of questions relating to treaties and to international law, there is the same fundamental reason for reconsidering earlier municipal decisions as exists in the case of questions of foreign law. It is not within the power of the House of Lords to achieve in respect of questions relating to treaties that finality which is the objective of, and the justification for, the doctrine of strict adherence to precedent. Nor is it within its power to crystallize international law, "a living and expanding code", in its present stage of development. To any who may think it a sufficient answer to this view to assert that "nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House",[3] it would seem legitimate to rejoin that "even if the provisions of the Act were merely declara-

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McNair, *The Law of Treaties*, at pp. 171–2.) The same view is expressed in a decision of the British-American Claims Arbitration Tribunal under the convention of 1910. (*In the Matter of the David J. Adams*, *American Journal of International Law*, Vol. XVI, p. 318.) These authorities refer primarily to the question of the international effect of a municipal decision, but it is submitted that they are also relevant upon the question whether such a decision should be regarded as a precedent not open to reconsideration in a municipal court.

[1] (1696) 13 St. Tr. col. 451.

[2] [1934] A.C. 586, 592. For a similar view as to the effect of municipal decisions followed by a change of international practice see *The Paquete Habana*, 175 U.S. 677, 693, 694 and *The Berlin*, [1914] P. 265, 272, with reference to the authority to-day of Lord Stowell's judgment in the *Young Jacob and Johanna* (1798), 1 C. Rob. 20. See also the reference to the evolving character of international law by Sir Robert Phillimore, Professor Mountague Bernard, and Sir Henry Maine in *Report of Royal Commission on Fugitive Slaves*, mentioned by Stephen, *History of the Criminal Law of England*, 1883, Vol. II, pp. 43–4.

[3] *London Street Tramways Co.* v. *London County Council*, [1898] A.C. 375, 381.

tory of the international law, the authority of the court as an interpreter of the law of nations would thereby be materially weakened, for no-one could say whether its decisions were based on due consideration of international obligations or on the binding nature of the Act itself".[1] Such a weakening in the authority of English courts as interpreters of the law of nations must inevitably prejudice gravely the possibility of achieving an adequate integration of the legal structure of international society.

V. *The Status of Advisory Opinions of the Permanent Court*

22. It remains to consider whether, so far as their authority in an English court is concerned, advisory opinions of the Permanent Court of International Justice are to be regarded as being upon the same footing as its judgments. So far as the international authority of advisory opinions is concerned, there has been a marked tendency from the outset to assimilate such opinions to judgments. The Court itself contributed to this tendency when it included in its original Rules of Court provisions assimilating the procedure in respect of advisory opinions to that in contested cases.[2] It made a further contribution in the same sense in the *Eastern Carelia* case when it declared that "the Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court".[3] By 1927 this tendency had gone so far that a committee of the Court, consisting of ex-President Loder, Judge John Bassett Moore, and Judge (later President) Anzilotti, stated that "the view that advisory opinions are not binding is more theoretical than real", and their report containing this statement was adopted by the Court.[4] Since that date the tendency has been further accentuated by the inclusion in the Revised Statute of the Court of provisions[5] relating to advisory opinions based upon those contained in the original Rules, and more particularly by the decision taken by the Court in 1931 that its advisory opinions should appear together with its judgments and orders in a single series of its publications.[6] This tendency has admittedly had its critics, and the question of the legal force of advisory opinions has inspired an extensive literature, an unusually large proportion of

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[1] *The Zamora*, [1916] 2 A.C. 77, 93.

[2] Articles 71–4 of the Rules of Court, as adopted in 1922.

[3] *P.C.I.J.*, Series B, No. 5, at p. 29.

[4] *P.C.I.J.*, Series E, No. 4, p. 76.

[5] Articles 65–8 of the Revised Statute of Sept. 14, 1929.

[6] *P.C.I.J.*, Series E, No. 7, p. 296.

which is by writers of high authority.[1] The value of this literature is considerably qualified, however, by the fact that most of it was written apropos of the controversy as to whether the Council must be unanimous in requesting an advisory opinion. Many writers who lay stress on the point that an advisory opinion is merely an opinion do so to buttress their view that a request for such an opinion does not require unanimity in the Council, and would be the last to deny that as contributions to the development of international law the advisory opinions of the Court have been as important as its judgments. A number of them would probably regard opinions which have been accepted by the Council or Assembly as having much the same binding force as judgments. The tendency disclosed by practice is therefore more significant than the weight of learned authority. In the light of the practice, the better view, as regards the general status of advisory opinions, would appear to be that stated by Dr. McNair when he writes that:

> "The dominant factor is that the Council always has adopted the advisory opinion of the Court, and is increasingly unlikely to depart from that course as the Court continues to grow in prestige; therefore, the proceedings before the Court, when the case for opinion is being argued, constitute in substance, if not in form, litigation between the parties, at any rate when it is a 'dispute' that is referred and there are parties to it; and, therefore, an advisory opinion when given does, having regard to the certainty of its adoption by the Council, in substance dispose of the matter in issue between the parties."[2]

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[1] There have been a number of extra-judicial expressions of opinion by judges of the Court and writers who have since become judges of the Court. See Bustamante, *The World Court*, pp. 264–5, and *Derecho Internacional Publico*, Vol. V, p. 373; R. Erich, "Quelques Observations sur la Nature Juridique des Avis Consultatifs" in *Revue de Droit International et de Législation Comparée*, 1928, pp. 864–81; A. Hammarskjöld, *La Juridiction Internationale*, at pp. 209, 214–20, 289–91, 372–83, 428–36, and 610–11. Manley O. Hudson, *The Permanent Court of International Justice*, pp. 455–7; Negulesco, "L'Évolution de la Procédure des Avis Consultatifs de la Cour Permanente de Justice Internationale" in *Hague Recueil*, Vol. LVII, pp. 64–80; Ch. De Visscher, "Les Avis Consultatifs de la Cour Permanente de Justice Internationale" in *Hague Recueil*, Vol. XXVI, pp. 23–51 and 58–65, and "Justice et Médiation Internationales" in *Revue de Droit International et de Législation Comparée*, 1928, pp. 254–62. See also *Annuaire de l'Institut de Droit International*, 1928, at pp. 408–77, 1929, Vol. I, at pp. 459–62, and Vol. II, at pp. 291–2, and 1937, at pp. 1–7, 164–82, 245–7, and 272–3; *Statuts et Règlements de la Cour Permanente de Justice Internationale—Éléments d'Interprétation*, pp. 452–75; McNair, "The Council's Request for an Advisory Opinion from the Permanent Court of International Justice" in *British Year Book of International Law*, 1926, at pp. 11–12; Lauterpacht, *The Function of Law in the International Community*, p. 335, footnote 2; Baker, "The Obligatory Jurisdiction of the Permanent Court of International Justice" in *British Year Book of International Law*, 1925, at pp. 75–6; Accioly, *Direito Internacional Publico*, Vol. I, p. 404.

[2] "The Council's Request for an Advisory Opinion from the Permanent Court of

English lawyers who are familiar with the status of the Judicial Committee of the Privy Council will have no difficulty in appreciating that an advisory opinion of the Permanent Court may be in effect indistinguishable from a judgment. Even if Dr. McNair's view should be regarded as too broad, there are certain special types of case in respect of which there can be no question that an advisory opinion has the same binding force as a judgment. The parties to a dispute may have agreed, immediately prior to the reference of the matter to the Court, to accept an advisory opinion as binding.[1] The advisory opinion may have been sought in pursuance of some instrument which expressly provides that such an opinion shall be binding either upon the parties thereto, or upon some arbitral or other body established thereby.[2] In cases in which there is no express provision of this kind, it may be that, as is the position in the case of advisory opinions relating to the International Labour Organization and to the interpretation of international labour conventions, a request for an advisory opinion is simply the most convenient way of approaching the Permanent Court for the purpose of obtaining a determination of issues in respect of which the Court has been entrusted with compulsory jurisdiction.[3] In this connexion it is of some interest that the Court has described itself as performing "a judicial function" when interpreting, in an advisory opinion, the Constitution of the International Labour Organization.[4] In view of the above considerations, it would seem that an English court should normally accord to an advisory opinion of the Permanent Court the same degree of authority as it would accord to a judgment. Special cases are conceivable in which it would not be unreasonable to regard an advisory opinion as being lacking in authority. If, for instance, an advisory opinion has been rejected by the Council or

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International Justice" in *British Year Book of International Law*, 1926, at pp. 11–12. The present writer ventures respectfully to differ from Dr. McNair as to whether this necessarily implies that the Council must be absolutely unanimous in requesting the Court for an advisory opinion except in cases relating to the procedure or method to be adopted by the Council in settling the dispute. For another type of case in respect of which some exception is imperative, even upon the assumption that, in general, absolute unanimity is required, see the memorandum submitted by the International Labour Office to the Council of the League of Nations in 1936, *League of Nations Official Journal*, 18th year, No. 2, Feb. 1937, at pp. 184–5.

[1] e.g. *The Tunis–Morocco Nationality Decrees* case, *P.C.I.J.*, Series B, No. 4.

[2] e.g. the unratified Convention for the Creation of an International Mortgage Credit Company, 1931, Article 12 (2), Hudson, *International Legislation*, Vol. V, pp. 968–9.

[3] e.g. by Article 37 of the Constitution of the International Labour Organization.

[4] *P.C.I.J.*, Series B, No. 13, p. 23.

Assembly, the authority of the opinion will, in the absence of any special ground for regarding it as binding, be to a great extent impaired thereby. Where, on the other hand, no question has arisen internationally as to the authority of an opinion, it would seem that an English court should treat the opinion as equivalent to a judgment.

VI. *Conclusions*

23. It may be convenient to summarize the main submissions made in the preceding pages:

(1) The observations made in certain cases upon the authority in English courts of decisions of the Permanent Court of International Justice do not relate to Permanent Court decisions upon questions of public international law, but to Permanent Court decisions relating to contracts governed by municipal law. The status in an English court of a Permanent Court decision relating to a question of public international law is still an entirely open one.

(2) The English courts recognize the desirability of attaching a certain weight to Permanent Court decisions on questions of commercial law with a view to the promotion of uniformity between the different legal systems which govern commercial contracts in different parts of the world.

(3) The Permanent Court's rules for the choice of law in cases relating to transactions governed by municipal law cannot be regarded as binding upon an English court, but it is desirable that an English court should follow these rules whenever possible in order to enable the Permanent Court to exercise a unifying influence upon the different systems of rules of conflict.

(4) Any decision by an English court which is in conflict with a Permanent Court decision binding upon Great Britain will, except perhaps in the event of its remaining a merely academic pronouncement devoid of any practical effect, involve the international responsibility of Great Britain.

(5) The right to accept the jurisdiction of international tribunals, with the effect of making their decisions binding upon Great Britain, is included in the prerogative of the Crown. When the Crown has exercised its prerogative with this effect an English court is bound by the result. The question whether Great Britain is bound by a Permanent Court decision is one of law and is therefore primarily one to be determined by the English court rather than by the Crown.

(6) An English court is under a duty to respect international law and obligations unless prevented from doing so by the failure of the legislature, which is a higher authority, to perform its corresponding duty. This constitutes a further ground on which an English court should follow a Permanent Court decision.

(7) Permanent Court decisions will be of binding authority chiefly in cases relating to treaties. If Great Britain were either an original or intervening party in the proceedings before the Permanent Court, or had accepted the compulsory jurisdiction of that Court in respect of the treaty under consideration, and the point decided by the Permanent Court subsequently came in issue before an English court, the English court should treat the Permanent Court decision as of binding authority. In other cases relating to treaties the Permanent Court decision will be of strong persuasive authority.

(8) As regards questions of customary international law, an English court should regard a *jurisprudence constante* of the Permanent Court, or even a single decision of unimpeachable authority, as of binding authority, but will have greater freedom of appreciation of the effect of Permanent Court decisions than in respect of treaty points. Permanent Court decisions will always be of high persuasive authority in respect of questions of customary international law. In particular, the existence of a Permanent Court decision will remove the difficulty of obtaining satisfactory proof of the existence of a rule of international law to which English courts have sometimes alluded.

(9) The House of Lords should not regard itself as bound by its own earlier decisions in any case in which there has been an intervening inconsistent decision of the Permanent Court of International Justice. The principles underlying the doctrine of the binding force of precedents are not applicable in such cases, and the practice as regards questions of foreign law is relevant.

(10) An English court should normally accord to an advisory opinion of the Permanent Court of International Justice the same degree of authority as it would accord to a judgment of that Court.

THE TECHNIQUE OF THE UNIFICATION OF PRIVATE LAW[1]

By PROFESSOR H. C. GUTTERIDGE, K.C., LL.D.; Associate of the Institute of International Law

ALTHOUGH the political situation has not, of late, been very favourable to international collaboration, either in legal or economic questions, the movement for the unification of private law is steadily pursuing its course. Much attention is being given, in particular, to the problem of securing uniformity in the rules of private international law.[2] The agencies at work are no less active than they have been in the past, but the methods employed, which vary considerably, are often haphazard and sometimes amateurish. There is no recognized technique, with the result that it is left to each of the organizations concerned to carry out the work in its own way and without much regard to the activities of kindred bodies. The general position seems to be one of disorderliness coupled with a regrettable duplication of effort and the formulation of schemes for unification some of which are of a very crude description. No one would wish to take any action which might operate to discourage the movement for unification, but it is difficult to avoid the conclusion that the present situation is far from satisfactory.

The time seems to have come for a reconsideration of the methods which are being employed at present by these organizations. In every country we find a section of legal opinion which is either hostile to unification or views it with apathy. If it is to be won over, it is essential that an attempt should be made to introduce more systematic methods and to remedy a situation which may ultimately bring the cause of unification into disrepute.[3]

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[1] No attempt will be made to deal with the question of the codification of the rules of public international law. The matter is one beyond the competence of the writer and depends, in any event, on considerations of a different order from those prevailing in the domain of private law.

[2] See Nolde, "La Codification du Droit International Privé", *Recueil des Cours de l'Académie de Droit International* (1936), Balogh, "Le Rôle du Droit Comparé dans le Droit International Privé", *ibid.* (1937).

[3] More attention might be paid, for instance, to the experience of the United States where the machinery of unification has been developed to a much higher degree than elsewhere. Some caution is, however, necessary in drawing inferences from the results of American experience because the conditions are so different from those prevalent in the Old World and the methods which have been employed in that instance cannot

The bodies which participate at present in the process of unification can be grouped as follows. In the first place there are certain scientific organizations which are concerned either wholly or in part with unification, such, for instance, as the *Institut de Droit International*, the Rome Institute for the Unification of Private Law, the *Institut für ausländisches Privatrecht* of Berlin, and the Academy of Comparative Law. Certain other organizations, such as the *Société de Droit Comparé* of Paris, the *Istituto di Studi Legislativi* at Rome, and our own Society of Comparative Legislation, are engaged in comparative research but do not participate in the work of unification.[1] Secondly, there are organizations whose object it is to bring together persons interested in international law and to promote the cause of international unity. The best known of these societies are the International Law Association, with its head-quarters in London and branches in the United States and several of the European countries, and the Congress of Comparative Law, which meets under the aegis of the Academy of Comparative Law. Lastly, a considerable part has been played in securing the unification of certain branches of maritime and commercial law by such bodies as the *Comité International Maritime* and the International Chamber of Commerce.

The classification does not cover the negotiation, under diplomatic auspices, of the actual terms of international conventions designed to secure uniformity of law. Negotiations of this kind are sometimes carried out by means of private discussions between the accredited representatives of the governments concerned,[2] but they may also take place at international conferences of a public or semi-public character.[3] The methods adopted in such cases follow diplomatic precedents and any problems involved form part of the general question of international treaty-making and only impinge at certain points on the matters which we are considering. But diplomatic intervention in proposals for unification cannot, as a rule, come into play unless and until a considerable amount of preliminary spade-work has been done

always be regarded as a model to be followed by unificationists elsewhere. See Barratt, "The Tendency to Unification of Law in the United States", *Journal of Comparative Legislation* (Ser. 3), Vol. V (1923), p. 227.

[1] This does not purport to be an exhaustive enumeration of organizations of this description.

[2] An instance of such discussions is furnished by the case of the negotiation of the Franco-British Convention of 1934 for the mutual enforcement of judgments.

[3] e.g. the Conferences held at Geneva in 1930 and 1931 on the Uniform Laws of Bills, Promissory Notes and Cheques.

which is usually of a kind which cannot well be undertaken by a government department. The unifying process must, in the vast majority of cases, be set in motion by unofficial enterprise, and it is with this preliminary aspect of the question that we are concerned and not with the conclusion of treaties to carry unification into effect.[1]

The formulation of preliminary proposals for unification obviously calls for research on a comparative basis in order to ascertain the nature and extent of the differences in law which must be smoothed away in order to secure uniformity. But it is not enough to carry out this task within the four walls of a library however admirably it may be equipped for the purpose. The relevant rules of law must be studied against a background of legal procedure and business practice, and this can only be done in a satisfactory manner if contact is established between the various interests concerned; the law schools, legal practitioners, and merchants, bankers, &c., must all collaborate if a true picture is to be obtained of the difficulties created by divergences in law and if effective means are to be devised for their removal. At the present time this preliminary task is assumed somewhat at random either by one or more of the scientific institutions to which reference has been made or by one or more of the societies of persons interested in international questions of a legal character. Little or no effort is made to distribute the work between these various bodies, with the result that a good deal of overlapping takes place and the public may thus be presented with the problem of deciding between two or more rival schemes for unification.[2]

It is, of course, obvious that the scientific organizations are in a position to render the greatest service so far as organized research is concerned. They are of two types which, for the sake of brevity and convenience, will be referred to hereafter as the "Institutes" and the "Societies" respectively. The term "Institute" will be employed to denote such bodies as are continuously engaged in research, whilst the use of the term "Society" will indicate that the body in question is not permanently in session but carries out its task at assemblies of its members held at more or less lengthy intervals of time. Such organizations as the International Maritime Committee and the International Chamber of Commerce will be referred to as the "Commercial Organizations".

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[1] Committees of jurists are sometimes appointed by the League of Nations and by the International Labour Office to scrutinize proposals which have been made for unification. They are outside the present survey since, in effect, they form part of the machinery for the diplomatic negotiation of conventions establishing unified rules.

[2] An instance of duplication of this kind is to be found in the matter of the Law of Arbitration. Proposals have been drafted by the Rome Institute for the Unification of Private Law, as well as by the International Law Association, the American Arbitration Association, and the International Chamber of Commerce.

The "Institutes" are few in number and the only one of them which is wholly devoted to research in connexion with the unification of private law is that established at Rome under the aegis of the League of Nations and endowed by the Italian Government.[1] The Berlin Institute for the Study of Foreign Private Law[2] is a very active force in the realm of comparative research but it is not exclusively devoted to the promotion of unified law. There are also certain other organizations of this type, such as the Institute for the Study of Ibero-American Law[3] and various Institutes attached to Universities[4] which correspond in certain respects to the definition given above of an Institute. An organization which occupies a very special position is the *Institut de Droit International*. It is an elective body which meets every two years. Its personnel, which is limited in numbers, is drawn from recognized experts in public and private international law. It corresponds more closely to an Institute, as we have defined it, than to a Society, but it possesses the features of both. Its activities so far as unification is concerned are confined to private international law.

Where celerity in the execution of the task of framing proposals for unification is desirable or where accuracy of statement is vital, there can be no doubt that these Institutes are in a highly advantageous position. They have at their command staffs of trained lawyers and are able to pursue their research without interruption. They are also well placed as regards access to the necessary sources of information. These advantages are, to some extent, counterbalanced by other considerations. It is, perhaps, inevitable that the personnel of these Institutes should be recruited from the ranks of academic rather than professional lawyers, and the result may be a certain tendency to ignore the realities of a situation. If this personnel is drawn, as is generally the case, from lawyers trained in a single system of law, the result may well be that undue importance is attached to the *systematik* of that system and that sufficient attention is not paid to the international environment in which rules of unified law will be called upon to function. In spite of the indisputable guarantee of dispatch and accuracy in the carrying out of their task which these Institutes can offer, it would appear to be undesirable to concentrate the process of unification in their hands. The services which they can render are indispensable but are not such as to make it unnecessary to call for the collaboration of other agencies qualified to render assistance in the difficult and complicated task of the formulation of proposals for unification. Organized research is not enough: it must be supplemented by consultation with those engaged in the practical administration of the law and also with any commercial interests which may be affected by changes in the existing rules. Team work of this description is undoubtedly difficult to organize, but the collaboration which has taken place between the American Law Institute, the American Bar Association, and business organizations in the United States in the enactment of uniform law shows that it is not beyond the bounds of possibility.[1]

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[1] Istituto per l'Unificazione del Diritto, Villa Aldobrandini, Rome. For an account of the activities of this organization see *British Year Book of International Law*, Vol. XVII (1936), p. 190.

[2] Institut für ausländisches Recht, Schloss, Berlin. See *Journal of Comparative Legislation* (Ser. 3), Vol. XII (1930), p. 118. This Institute publishes a valuable periodical *Zeitschrift für ausländisches und internationales Privatrecht*.

[3] See *Journal of Comparative Legislation* (Ser. 3), Vol. IX (1927), p. 267.

[4] Valuable work has, in particular, been done by the institutes attached to the Universities of Paris and Lyons. See *Journal of Comparative Legislation* (Ser. 3), Vol. IV (1922), p. 84.

On the other hand the mode of procedure adopted by the "Societies" also lends itself to criticism. These societies vary considerably both in aims and as regards the manner in which their personnel is recruited. They all have this in common with the commercial organizations, that one of their objects is to bring together persons interested in international affairs either from a legal or an economic standpoint. The division between legal and other international relations is, however, not always very strictly adhered to and questions which are primarily of legal importance sometimes come up for discussion at meetings of business men and *vice versa*. No one would attempt to deny the value of the services which these organizations can render to the cause of unification. They alone can create the volume of well-instructed popular opinion which supplies the motive-power of the machinery of unification. They furnish the best available meeting-ground for the interchange of views between lawyers of different nations and between lawyers and men of affairs. They have an excellent record of achievement to their credit in the past[1] and have kept the torch alight at times when efforts for international collaboration have threatened to become submerged in a fog of political tension and misunderstanding.

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[1] Cf. Chalmers's observation that "It is not easy to get the right people together to frame the draft laws". (*Journal of Comparative Legislation* (Ser. 3), Vol. VII (1925), at p. 250.)

The number of such societies is not large and only two of them are definitely legal in character, i.e. the International Law Association and the Congress of Comparative Law. The remainder are commercial organizations such as the International Chamber of Commerce and the International Maritime Committee which display a keen interest in the unification of maritime and commercial law. It would seem that in all countries the impulse towards the removal of legal barriers to international intercourse emanates rather from commercial than from legal sources. Organizations of this nature cannot therefore be excluded from any survey of the various agencies concerned in the work of unification.

The main criticisms which can be directed against the methods adopted at the present time by the Institutes and the Societies in carrying out the preliminary work of unification would seem to be the following. A defect which is common to both types of organization is the failure to recognize that unification is a long and difficult process which must necessarily pass through several stages.[2] The first of these stages consists in the preliminary study of the relevant rules of law on a comparative basis for the purpose of discovering not only the extent to which these rules are divergent but also how far the divergences are fundamental when viewed against the background of legal procedure and business practice in which the rules are called upon to function. The second stage is constructive and takes the form of the utilization of the results of this comparative study for the purpose of formulating proposals for unification. The third and final stage is that of the negotiation under diplomatic auspices of terms which can be embodied in an international convention and thus bring unified law into being. In the writer's submission most, if not all, of the discouraging features now encountered in the movement for unification can ultimately be traced to a tendency to confuse these separate stages in the process, with the result that many of the proposals which emanate from the Institutes and Societies are either immature or impracticable.

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[1] For instance, we owe such important achievements in the field of unification as the York Antwerp Rules and The Hague Rules to the International Law Association.

[2] "For the laws to make an entire and perfect union it is a matter of great difficulty and length both in the collecting of them and in the passing of them." *Certain Articles or Considerations touching the Union of the Kingdoms of England and Scotland.* The Works of Lord Bacon (Bohn's Edition), Vol. I at p. 457.

The first and second stages of the process will often be protracted since they must, as a rule, involve a systematic and careful study of very difficult and complicated problems calling for prolonged and patient investigation coupled with the consultation of the diverse interests concerned, such as government departments, bodies of legal practitioners, and commercial organizations. Unfortunately unificationists, like other enthusiasts, are apt to be in a hurry and to adopt conclusions which though completely logical in themselves are not necessarily adapted to function in an international environment or to gain that general acceptance by the public without which unification cannot be brought to a successful conclusion. Changes in the law which are not well understood may easily give rise to suspicion, and there can be no doubt that the movement for unification has been hampered by too much haste in its earlier stages and by inadequate and ineffective propaganda. It is impossible to ignore the human element in the situation: if it is disregarded, even the most urgent and reasonable proposals may come to grief.

The technique followed at the present time by most of the Institutes and Societies consists in drawing up proposals in the form of draft codified rules and of annexing to them a *Rapport* or document explaining the draft rules article by article, together with the reasons which have prompted the solutions contained in the draft. This is an expedient which has been borrowed from the legislative practice of continental Europe,[1] and one of its objects is to do away with ambiguities of phraseology so far as is humanly possible. The continental judge, when confronted with a problem of interpretation which cannot be solved in some other way, is authorized to consult the *travaux préparatoires* which in most cases will include a *Rapport* of this description. This practice is, of course, incompatible with the technique of judicial interpretation as understood in England,[2] but this is not the point with which we are concerned at the moment. In the writer's submission this practice has unfortunate consequences in the international sphere because it is an inversion of the method which is most likely to produce a good result. It places the draft rules first and relegates the explanatory memorandum to a place of inferiority, so that attention is apt to be diverted from the problems awaiting solution and to be concentrated on points of detail and the minutiae of draftsmanship. The argument that it is very difficult to secure the proper discussion of proposals unless they are submitted in the guise of draft rules is one which carries very great weight, but it applies rather to the later than the early stages in the process of unification. Preliminary proposals gain rather than lose if their elasticity is preserved, and general propositions may succeed in raising discussion where a negative attitude would be taken up towards a solution crystallized in the rigid form of a set of rules. It is not suggested that there should be a report and no rules: but the draft rules, it is submitted, might with advantage be treated not as the definite proposals, but as representing the kind of form that the rules would assume if they were put into legislative shape. The result would be that the general nature of the changes to be carried out in existing laws would be clearly indicated and that the premature discussion of points of drafting would be avoided.[1] The system of a draft law accompanied by a *Rapport* also creates difficulties in securing the co-operation of Anglo-American lawyers and men of business, but the discussion of this particular aspect of the question involves considerations which lie outside the scope of this article.

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[1] Typical instances of this method are to be found in the draft laws prepared by the Rome Institute, i.e. the draft International Law of Sale, the draft International Law of Innkeepers, and the draft International Law of Arbitration.

[2] See H. A. Smith, "Interpretation in English and Continental Law", *Journal of Comparative Legislation* (Ser. 3), Vol. IX (1927), p. 153; Gutteridge, "A Comparative View of the Interpretation of Statute Law", *Tulane Law Review*, Vol. VIII (1933).

Another and not less important feature of the present-day technique of unification is the inadequacy of the steps which are taken by the framers of proposals for unification in order to ascertain the views of the legal profession and commercial circles in the countries which may be affected. This is not necessarily the fault of the Institutes or Societies. Legal practitioners everywhere are notoriously apathetic in matters of law reform, even if they are not hostile, and it is always a matter of considerable difficulty to induce them to participate in the discussion of proposals for unification. The co-operation of men of business is more easily secured because they are more closely affected by difficulties arising from divergences between the laws of different countries, but as matters now stand it is not always easy for the lawyers engaged in working the process of unification to establish the kind of contact with business circles which is desirable. Changes in the law do not always operate evenly throughout a particular trade; for instance, the impact of a proposed new rule on the interests of importers and exporters may not be the same.[1] "Big business" tends to predominate in the commercial societies, and "big business" is apt to have its own solutions of the questions at issue in the shape of the rules embodied in standard forms of contract and to be less interested in the problem than those who trade on a more modest scale. It must be said, however, that the commercial societies, and in particular the International Chamber of Commerce, have always shown the greatest readiness to afford any assistance in their power, and that any shortcomings which there may be in the present method of testing the effect of proposed changes on the business situation cannot fairly be laid at their door.

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[1] "If the League of Nations . . . proceeds to prepare draft laws, it is to be hoped that it will not try to embody them in treaties, so that they must be either accepted as they stand, or rejected." Chalmers, *loc. cit.*

It is sometimes suggested that committees and other bodies engaged in the process of unification should always contain an element of business men, but this is an expedient which is rarely successful. Lawyers and merchants do not always understand one another: law has its jargon and so has commerce. It is too much to expect a busy man of affairs to spend his time listening to a discussion of legal technicalities which mean nothing to him. The matter is one of considerable importance and seems to call for further consideration by all the parties concerned. It should not be impossible to devise improved methods of co-operation between lawyers, bankers, merchants, and other interested persons.

So far we have been dealing with the technique employed both by the Institutes and the Societies. But the criticisms directed against the method of formulating proposals in the form of draft rules apply with much greater force to the Societies than to the Institutes. The personnel of the Institutes is composed of specialists who can claim to be experts on the legal questions at issue, and no one would dispute their claim to frame proposals for unification when all the necessary spade work has been done. This is also true of Societies like the International Maritime Committee which recruit their membership by a process of selection from among lawyers and laymen who have an expert knowledge of the questions which are to be dealt with by the Committee. But certain of the Societies—it would be invidious to refer to them by name—are largely composed of persons who are in no sense experts and are sometimes not even familiar with the topics which come under discussion at meetings of the members. The meetings of these bodies are attended by large numbers—an assembly of some three or four hundred people being by no means unusual. The members drift from one section of the assembly to another as the fancy takes them and, if they happen to be present when a resolution is moved, they may vote on it whether they have listened to the previous discussion or not and regardless of the fact that the matter at issue may be one of which they have only a superficial knowledge or no knowledge at all.[1] The value to be attached to resolutions of this nature is, consequently, almost negligible, but unfortunately this is not always appreciated by the outside world, and these resolutions may pass muster as authoritative expressions of opinion and be quoted by textbook writers and even by international tribunals. Where unification is in question this unsatisfactory feature of the proceedings of these Societies very much diminishes the importance to be attached to proposals emanating from them. Quite apart from this, the mode of procedure by what may, perhaps, be termed the "Congress" method is open to serious objections. It is often a source of mortification to the executive officials of an assembly of this kind if it breaks up without passing some sort of a resolution. The tendency is, therefore, to endeavour to steer the proceedings of the assembly in that direction which is most likely to secure the votes of the majority of those who are in the assembly room at the crucial moment. If the assembly shows any signs of reluctance the members present are exhorted to lay aside their individual convictions and to vote for the resolution in the interests of the sacred cause of international unity. Pressure is also brought to bear on recalcitrant members in the lobbies of the assembly room and in the lounges and smoking-rooms of hotels. If all else fails, concessions may be made which destroy the practical effect of any resolution which is passed, or the delegates of some of the interests concerned may be permitted to attach reservations to their votes with a like result. National *blocs* of members may also endeavour to force a decision which is favourable to the interests of their countries.

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[1] "A rule which may suit a marine underwriter may not be acceptable to the shipper or shipowner and shippers have not identical views on many points." Chalmers, *loc. cit.*

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[1] Rabel very truly remarks that even where a society limits its membership to persons with expert knowledge the result of discussions may well be to emphasize rather than to minimize differences of opinion. "*Kongresse pflegen den wissenschaftlichen Meinungsstreit zu bereichern aber nicht zu schlichten.*" ("Die Fachgebiete des Kaiser-Wilhelm Instituts für ausländisches und internationales Privatrecht", in the third volume of *25 Jahre Kaiser Wilhelm Gesellschaft zur Förderung der Wissenschaften* at p. 78.)

There are other aspects of the "Congress" method which detract to a certain extent from its usefulness. The rules of procedure of the Societies are often treated with scant respect and resolutions may be moved on the spur of the moment and carried in a snap division. Much may depend on the venue of the meeting of a peripatetic society because it is inevitable that the majority of those attending an assembly should come from the country in which the meetings are held or from countries within easy reach. A feature of these Congresses which must be referred to, though only with reluctance, is that their work may be hampered by the introduction of an element of "joy riding" into the proceedings. An elaborate programme of hospitality is drawn up and banquets, receptions, excursions, and social activities of various kinds may occupy a disproportionate amount of the time and energy of the assembly. The business in hand may consequently be conducted at high pressure and resolutions may be pushed through by masterful chairmen in order to allow time for attendance at some function. Any one who has experience of international conferences will be aware of occasions on which matters of importance have been under discussion, but the exigencies of debate have had to yield place to the demands of luncheons, banquets, or trips by charabanc or on a river steamboat. Social intercourse is, of course, an element of great value in securing international agreement and it is not intended to suggest that entertainments should be banned, but a plea is submitted for a policy which would confine them within such limits as may be required to avoid conflict with the measured and unhurried deliberations of international assemblies.

It would be possible to refer to other features of these congresses which are a source of irritation and delay, such as the tendency of delegates to indulge in lengthy speeches which no one listens to except, perhaps, the representatives of the national press of the orator. A rainy Sunday is often followed by a spate of eloquence on the succeeding days as the delegates, having little else to do, devote their leisure to the composition of speeches which would not otherwise have been delivered. These are, however, merely outward manifestations of the foibles of humanity which can no more be eliminated from the ambient of international assemblies than from that of any other gatherings of mankind.

Finally, since the unification of law involves legislation by all the countries concerned it does not seem to be out of place to refer to certain difficulties which have to be faced if the participation of Great Britain in unification is to be ensured. These centre, for the most part, round the method of embodying the relevant proposals in the form of draft codified rules to which allusion has already been made. The Institutes and Societies are, generally speaking, multi-lingual and these rules are sometimes drafted in English, more often in French, and sometimes, though rarely, in some other language. The result is that the draftsman, who inevitably has at the back of his mind the drafting technique of his own law and its legal principles and terminology, tends to impress on his product the features of a particular system. He may, for instance, use terms which are not capable of translation into another language without giving rise either to a false meaning or to some expression which is bereft of any precise meaning at all. He may base his draft on some legal concept, such as that of the "abuse of rights" which is not common to every system of law, or on a rule of law which is peculiar to his own system. In any of these events the rules which he formulates may have unfortunate repercussions in the international sphere.

Further, the technique of legal draftsmanship is not the same everywhere. In the Latin countries the draftsman aims at a concise, well-phrased, and logical expression of a rule; in England the preference is for a more pragmatical statement, which has no claims to literary or legal elegance but is designed to meet the practical situations which the draftsman has in mind. The English practice of inserting definition clauses in acts of parliament is viewed with disfavour on the Continent, whilst cross-references to other sections of the same statute, which are anathema to English lawyers, are common practice on the Continent. Differences in legal terminology are sometimes a stumbling block and at other times a source of danger. These difficulties are, perhaps, inevitable, but for our present purpose they emphasize the necessity for the exercise of the greatest care and the avoidance of undue haste in presenting proposals for unification.

Conclusions

The situation which now exists in the field of the unification of private law is one which readily lends itself to criticism, but it is not so easy to suggest appropriate remedies. It seems to be clear that the difficulties experienced do not arise from the multiplicity of organizations concerned in the matter. Each of them has its own work to do and can render services of great value within the orbit of its own special activities. The causes of the relative failure of the movement for unification to achieve the aims which inspired it in the early part of this century must be sought elsewhere.

The following suggestions are made with great diffidence and solely in the hope that they may, perhaps, lead to further discussion of the matter.

(A) It is submitted that much more time and effort should be devoted than at present to the preliminary exploration of the problems awaiting solution by means of the enactment of unified law. By "preliminary exploration" I do not mean the comparative research necessary to establish the existence of a problem calling for unification, but the second stage of the unifying process, which consists in the study of the obstacles to the achievement of uniformity in law which may exist in various countries. The work of comparative research is generally well carried out. If proof of this be needed, it is only necessary to point out such notable comparative studies as those which will be found in Dr. Rabel's *Waren-Verkauf*[1] and Professor David's *Rapport sur l'Arbitrage*;[2] both of them embody the results of research designed to assist the process of unification. But there is a tendency to assume that once the existence of a problem calling for unification is established, all that is necessary is to sit down and devise a new series of rules which will provide the ideal solution. Insufficient care is taken to ascertain how far the countries concerned are likely to agree to such changes in their national law as will bring about the desired unification. Many questions arise in this connexion and they cannot be discussed within the limits of this article. It will be enough for our present purpose to refer, generally, to the fact that considerations arising out of national legal mentality and national business practice often constitute the most serious obstacles to the best-thought-out schemes for unification. In particular, experience shows that any proposal for the uniformity of rules of substantive law which involves interference with national rules of procedure usually meets with a very bad reception. These and similar questions do not at present receive the attention which is called for, if unnecessary friction and delay are to be avoided. Those who know the practical working of the process of unification will be aware of the difficulty which a national delegate sitting on a committee or attending a conference is exposed to if he raises points of this description. It is far from easy to elaborate them in the rough and tumble of debate, and his efforts to elucidate the situation are often treated by his colleagues of other nationalities merely as an expression of the fact that his country is unwilling to make the sacrifices necessary to ensure agreement.[1] Silence, on the other hand, may be taken as equivalent to assent. Questions of this kind should, therefore, form the subject-matter of distinct and careful study. For this purpose the collaboration of the legal profession, of the universities, and of business circles in all countries should be secured.

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[1] This work, which constitutes one of the most remarkable achievements in the domain of comparative legal research, is based on the preliminary work carried out at the Berlin Institute in connexion with the International Law of Sale drawn up by a committee of the Rome Institute.

[2] The Report embodies the research undertaken at the Rome Institute in connexion with the proposals for an international code of arbitration law.

(B) The introduction into the unifying process of the elements of professional, academic, and business opinion involves the organization of a system of consultation between the various elements concerned. This in turn calls for the co-operation of the governmental agencies of the countries which will be affected by the proposals for unification. It would clearly be impossible, in existing conditions, for any internationally constituted body effectively to demand and secure the co-operation of national elements. But the relevant government department in each country will, as a rule, be in a position to elicit the requisite expression of views, provided that it is placed in possession of such detailed information on the points in issue as will enable it to formulate the necessary questionnaires or other inquiries.

(C) It will be difficult to secure the necessary co-operation of the governments concerned unless some kind of international centre is provided which is in a position to bring this element of co-operation into being. An agency of this character lies ready to hand in the League of Nations, which has already functioned in this respect with considerable success in the case of the proposals for the unification of the law of negotiable instruments. It must be remembered, however, that in this particular instance the League was, in reality, reaping the harvest which had been sown by the Government of the Netherlands at The Hague Conferences of 1910 and 1912, and it is thus not possible to assert that the existing machinery of the League is adequate for the purpose. There seems to be no reason, nevertheless, why a separate department of the League should not be charged with the duty of acting as a clearing-house for proposals for unification. This might, possibly, have been the intention governing the establishment of the Rome Institute for the Unification of Private Law, but, be this as it may, the Rome Institute has functioned in practice as a body charged with the promotion of proposals for unification rather than as a clearing-house of this description. No objection can be taken to this policy, which has resulted in the rendering by the Institute of services of the greatest value. The way would, however, seem to lie open for the existence of a branch of the League's activities concerned with what might be described as the business side of unification so designed as to bring to an end the present state of overlapping and confusion and to ensure the adequate investigation of the problems for which a solution is sought in uniformity of law.[1]

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[1] It must not be thought that this is invariably the case. For instance, at the Geneva Conferences of 1930 and 1931, on the unification of the law of negotiable instruments, great readiness was shown to consider points of this character and they not infrequently formed the principal feature of the discussions.

(D) The method adopted at present by the Institutes and Societies of drafting elaborate and detailed codified rules embodying proposals for unification appears to require reconsideration. The better technique would seem to be the formulation of the proposals, not as rules, but as reasoned statements of the need for unification and of the measures which are best calculated to bring it about. In other words proposals for unification should be based on the *Rapport* and not, as at present, on draft rules. The proper place for draft rules is, it is submitted, in a schedule to the *Rapport*. The task of framing the draft law which is ultimately to form the subject of negotiations for unification cannot be carried out adequately by organizations which are not representative of the governments, without whose co-operation any scheme for unification must remain a pious aspiration.

Generally: It is submitted that the suggestions which have been made would not in any way operate to hamper the activities of the organizations engaged in the task of unification. They represent a plea for the co-ordination of the efforts which are now being made and for the employment of an improved technique in the formulation of proposals for unification.

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[1] The collaboration of non-members of the League might be available. The Rome Institute has derived valuable aid from the presence of distinguished American lawyers on its committees.

REPUDIATION OF THE OPTIONAL CLAUSE

By ALEXANDER P. FACHIRI

In April 1938 the Republic of Paraguay purported to withdraw its acceptance of the Optional Clause conferring compulsory jurisdiction upon the Permanent Court of International Justice. It is the purpose of this paper to consider the effect, from a legal point of view, of this action.

Paraguay is one of the states mentioned in the Annex to the Covenant and was an original Member of the League of Nations. She was also one of the early signatories of the Protocol of Signature of the Statute of the Court, but did not ratify until May 11, 1933, when she also accepted the Optional Clause. The declaration of acceptance was in the following terms:

> "Paraguay recognises, purely and simply, as obligatory, as of right and without a special convention, the jurisdiction of the Permanent Court of International Justice, as described in Article 36, paragraph 2, of the Statute."

There was no time limit.

On February 24, 1935, Paraguay gave notice of withdrawal from the League, and on April 26, 1938, issued a decree withdrawing acceptance of the Optional Clause. The terms of this document require somewhat close attention as they contain the grounds upon which the Republic bases its action. The decree recites: (1) that the National Executive, by virtue of a law dated January 14, 1933, accepted the compulsory jurisdiction of the Court; (2) that "in some sort" this acceptance was a consequence of Paraguay's participation in the League of Nations, the Court having been instituted in execution of a provision of the Covenant; (3) that Paraguay had ceased to be a Member of the League; (4) that Paraguay's acceptance of the compulsory jurisdiction of the Court was given purely and simply without any engagement to maintain it for a determinate period; (5) that the abovementioned law is not mandatory but merely confers authority upon the Executive; (6) that consequently there is nothing to prevent the withdrawal of the adhesion given by Paraguay to the compulsory jurisdiction; (7) that, moreover, the Protocol of June 12, 1935, relating to the frontier dispute between Paraguay and Bolivia, provides for a special method of settlement dependent upon a direct agreement or a legal arbitration, the fundamental bases, procedure, and particular conditions of which are to be determined exclusively by the interested parties. In these conditions (proceeds the decree), the Provisional President of the Republic decides: *Article 1*, to withdraw Paraguay's adhesion to the compulsory jurisdiction of the Court referred to in Article 36, paragraph 2, of the Statute; *Article 2*, to communicate this decision to all concerned.

This decree was communicated, on May 27, 1938, to the Secretary-General of the League and by him to the Registrar of the Court, the signatories of the Court's Statute, and the Members of the League. A number of states, including Bolivia, have in reply placed on record their reservations as regards the legal effect of Paraguay's action.

These being the facts, what is the legal position? Let us in the first place consider the recitals of the decree set out above, which presumably represent the grounds upon which Paraguay relies to justify what she has done. The first three recitals may be summarized as an argument that acceptance of the Optional Clause is related to and dependent upon membership of the League of Nations. This is obviously a point of great importance, going far beyond the particular case of Paraguay, and it is highly desirable that a clear conclusion upon it should be reached. A preliminary comment is that the argument applies equally to acceptance of the Statute of the Court as a whole, there being nothing to differentiate the Optional Clause from the rest of the Statute as regards the importance or otherwise of membership of the League. If this be so, Paraguay's argument involves the proposition that membership of the Court and membership of the League are so intimately related that withdrawal from the one carries with it withdrawal from the other. From a formal standpoint such a proposition is, of course, quite untenable. The Court's Statute is separate and distinct from the Covenant, and acceptance of it is given by an independent international instrument, the Protocol of Signature. There is nothing in this Protocol to suggest that a state which has signed and ratified it is released or can withdraw from adherence to the Statute because it has ceased to be a Member of the League. The same is true of the Optional Clause, which is merely an addendum to the Protocol of Signature. Is there any reason of substance in favour of a different view? I think not. It is true, as the Paraguayan decree points out, that the Court was created in consequence of the injunction contained in Article 14 of the Covenant that the Council should "formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice". It is also true that the judges of the Court are elected by the Council and Assembly and paid through the League, and that in certain other respects the two institutions are related to one another. But the Court is fundamentally an independent body. Once elected the judges are entirely free of League control and the Court performs its own functions, which are quite distinct from those of the League, in complete independence of it. Further, the Statute itself provides expressly for the participation in the work of the Court of states which are not Members of the League. Thus Article 35 states that:

> "The Court shall be open to the Members of the League and also to states mentioned in the Annex to the Covenant. The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court. When a state which is not a Member of the League of Nations is a party to a dispute, the Court will fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court."[1]

Finally, the history of the Court makes the position abundantly clear, as is illustrated, on the one hand, by the long drawn-out negotiations for the adherence of the United States, and, on the other, by the attitude of Brazil, Japan, and other states, which although they have withdrawn from the League remain members of the Court. It has never been suggested that membership of the League is a condition of membership of the Court. As a matter of fact, the revision of the Statute undertaken in 1929 and brought into force at the beginning of 1936 was partly designed to facilitate the participation of non-members of the League by enabling them, for example, to take part in the election of the judges.[2]

So much for the position as regards the Statute generally. It may, however, be suggested that special considerations apply to the Optional Clause. As already observed, the Optional Clause is merely part of the Protocol of Signature of the Statute—it is a clause, attached to the Protocol, acceptance of which is optional for those who have signed the Protocol. The terms of the Optional Clause should be recalled:

> "The undersigned, being duly authorized thereto, further declare, on behalf of their Government, that, from this date, they accept as compulsory *ipso facto*

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[1] The last sentence was added to the text of Article 35 in the revised Statute which came into force on February 1, 1936.

[2] See Article 4 of the revised Statute. Paraguay is a party to the revised Statute.

and without special convention, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, under the following conditions."

It is evident that acceptance of the Optional Clause is acceptance of an integral part of the Statute, namely, Article 36, paragraph 2, which defines the Court's compulsory jurisdiction. No distinction can be drawn as regards the effect of membership or non-membership of the League between acceptance of the Statute generally, by signature of the Protocol, and acceptance of Article 36, paragraph 2, by signature of the Optional Clause. This is true as a matter of substance no less than form, as there is no reason in the nature of things why a non-member of the League should not be bound by the Optional Clause exactly in the same way as it is bound by the Statute generally, and withdrawal from the League has no more relevance in the one case than in the other.

The next point taken by Paraguay is that referred to in recital (4) of the decree, namely, that the acceptance of the Optional Clause was not accompanied by a time limit. The precise way in which the point is put should be noted, the words of the decree being that the acceptance or adhesion of Paraguay to the compulsory jurisdiction of the Court was given purely and simply without any engagement to maintain it for a definite period. It appears from this statement and the conclusion drawn from it in recital (6) that the argument which it is intended to put forward is that owing to the fact that the declaration accepting the compulsory jurisdiction did not contain any provision indicating that it was subject to a time limit Paraguay is free to withdraw her acceptance at any time. Is there any foundation for this somewhat surprising argument? In the case of an ordinary treaty there can be no doubt that in the absence of terms limiting its duration or providing for denunciation the presumption is that the treaty remains in force permanently. This presumption may be rebutted if there is something in the provisions of the treaty itself or the circumstances in which it was negotiated which clearly shows a contrary intention, and it may be that even a treaty intended to be permanent may in certain cases become inoperative by application of the doctrine of *rebus sic stantibus*. The Paraguayan argument, however, does not purport to be based upon either of these grounds; it amounts, on the contrary, to an unconditional claim of the right of withdrawal based upon the mere fact of the absence of a time limit. It is unnecessary to labour the point that in relation to an ordinary treaty such a claim would be obviously bad. Is there anything in the nature of the Optional Clause system to differentiate the position? The answer, I submit, is No. The compulsory jurisdiction of the Court is based upon acceptance of the Optional Clause by the states concerned. It is true that the declaration of each state whereby such acceptance is given is a unilateral act, but by its acceptance each state undertakes an obligation to submit to the jurisdiction in relation to every other state which undertakes the same obligation, whether before or after itself. Thus, although the declaration is in form unilateral, the rights and obligations to which it gives rise are mutual. A state accepts the Optional Clause because states A, B, and C have accepted it and states X, Y, and Z may accept in future and it knows that it will have the right to bring any accepting state before the Court just as such state will have a reciprocal right as against itself. The whole object of the Optional Clause is to create an effective system of compulsory jurisdiction, an object which would be entirely defeated if it were open to accepting states to withdraw at will, since withdrawal at will means that the submission of any given dispute to the Court can always be prevented. Of the thirty-eight states now bound by the Optional Clause the great majority have accepted the compulsory jurisdiction subject to a time limit, but a minority have, like Paraguay, accepted without time limit. If Paraguay's argument were right each of the majority states could be brought before the Court by a minority state at any time within their time limit, but the minority states could always prevent any of the majority states bringing them before the Court by withdrawing when the dispute arose. It is obvious that such a one-sided arrangement cannot be justified in law or correspond with the intention of the parties to the Clause. It may, or may not, be expedient as a matter of policy to attach to acceptance of the Optional Clause a time limit, which can be renewed at will, but if a state has not seen fit to do so it is clear that it intended to be and is bound permanently, or until the other signatories of the Clause release it from its obligation.

Recital (5) appears to be directed to an internal constitutional point and accordingly does not call for comment here, and recital (6) is merely a conclusion drawn from the preceding recitals. Recital (7), which relates to the dispute between Paraguay and Bolivia, is quite possibly the key to the real motive underlying the decree, but it has no weight as a legal argument for withdrawing from the Optional Clause. The fact that there is an agreement between the two powers providing for a special method of settlement is quite immaterial in this connexion. There are, of course, many instances of states bound by the Optional Clause which have such agreements, and the two things are perfectly consistent, the position being that effect is given to the special agreement unless and until some obstacle arises in its operation which leads to a deadlock, when the Optional Clause can be resorted to.

Having now briefly reviewed the reasons put forward by Paraguay for her action, I venture to submit that the result of this examination is to show quite plainly that none of the reasons given has any validity in law.

There remains a general question which has not been raised in terms, but which, nevertheless, it may be well to mention, namely, the question of the *clausula rebus sic stantibus.* It would, of course, go far beyond the scope of this paper to embark upon a discussion of the doctrine referred to. Suffice it to say that, in some form or other, it must, in my view, be treated as part of the law of nations, for law in general and international law in particular are, after all, founded upon common sense and moral justice, and it would be contrary to both if parties to an agreement were always and in all circumstances to be held to their bond no matter what changes had occurred in the situation with reference to which they contracted. In the present case, however, it is obvious that there can be no room for the application of the doctrine, for there has been no change of circumstances which could, on any view, be regarded as coming within the principle. No one could contend that the *clausula rebus sic stantibus* can be invoked by a state which has by its own act—withdrawal from the League—brought about a change which, in itself, does not fundamentally affect the obligation which it is sought to terminate.

In conclusion, there is some comfort in the thought that in this case, at least, the machinery exists for testing judicially whether the claim to repudiate an international obligation is justified, for there can be no doubt that it is open to any state bound by the Optional Clause to bring the question of Paraguay's withdrawal before the Court and to obtain a decision upon it.

THE ABOLITION OF BRITISH CAPITULATORY RIGHTS IN THE FRENCH ZONE OF MOROCCO

1. In the 1938 volume of the *Year Book* the present writer discussed the agreement for the abolition of the capitulations in Egypt, signed at Montreux in May 1937. Two months later, on July 29, a convention was signed at London for the abolition of British capitulatory rights in "the French zone of the Shereefian Empire" and of French capitulatory rights in Zanzibar. This convention was ratified and came into force on January 1, 1938.[1] Further, on July 18, 1938, there was signed at Paris a treaty regarding commercial relations between the United Kingdom and the French and Tangier zones of Morocco which still awaits ratification.[2] There is a connexion between all these three instruments. In order to explain this connexion and to understand the reasons for the two new Morocco agreements, it is necessary to go back over some of the diplomatic history of Morocco during the last seventy years, and to see in particular how Morocco came to be divided into three zones and why the convention regarding the capitulations applies to the French zone only and the commercial treaty to the French and Tangier zones only.

2. In the eighteenth and nineteenth centuries Morocco was an independent state, predominantly Arab and Moslem, under the rule of the Sultan of Morocco and Fez, who concluded treaties of peace and friendship with a number of Christian Powers.[3] The treaties were on the same lines as those concluded at much the same time with the Ottoman Empire and were designed to secure convenient conditions under which the merchants of the Christian Powers could trade with the country. In 1856 Morocco concluded with Great Britain two treaties, a general treaty and a commercial convention.[4] As a result of similar or of most-favoured-nation provisions in their treaties with Morocco, which were either earlier in date or concluded shortly afterwards, Sweden, Denmark, France,

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[1] Published as Treaty Series No. 8 of 1938.

[2] Cmd. 5823 of 1938 Morocco No. 1.

[3] Spain acquired in the eighteenth century three ports on the north coast of Morocco (Ceuta, Malilla, and Alhucemas). These "presidios" are Spanish territory and are on a different footing from the surrounding territory which is now "the Spanish zone of the Shereefian Empire".

[4] At this period Great Britain had a predominating influence in Morocco. In 1859 there had been a war between Spain and Morocco and the terms of the peace treaties of Lalla Marnia and Tetuan were largely arranged by Her Majesty's Government.

Spain, the United States, the Netherlands, Belgium, Germany, and Austria possessed rights in Morocco similar to those obtained by Great Britain by the treaties of 1856.

3. Articles 4, 5, 8, 9, and 10 of the British General Treaty of 1856 provided that British subjects should be free to travel and reside in Morocco and acquire dwellings and warehouses there; that they should pay no taxes or impositions; that their dwellings, &c., could only be entered and searched on the order of the consul; that their property should be free from requisitions, &c.; that all proceedings against British subjects, civil or criminal, should be brought before the consul—the Kadi having the right to be present if the plaintiff was a Moorish national—and proceedings brought by British subjects against a Moorish national should be brought before the Kadi, the consul having a right to be present. Article 20 extended the privileges of British subjects to all persons under British protection. The immunity of British subjects from the jurisdiction of the local courts was recognized in Morocco as in other capitulatory countries as carrying with it the general principle that the local law did not apply to them either. The jurisdiction reserved to the consul under these articles of the treaty was exercised by the British consular court for Morocco and by the Supreme Court for Gibraltar under Orders in Council made under the Foreign Jurisdiction Acts (the Order in force in 1937 was the Morocco Order in Council 1889–1929 Consolidated). The law applied by these courts consisted of the provisions of the Order in Council and of English law as made applicable by the Order in Council. There was power under the Order to make "King's Regulations", i.e. local laws for British subjects in Morocco. Most of these King's Regulations, which became very numerous in later years, embodied various Shereefian laws or ordinances (*dahirs*) which were thus, and by way of exception to the general principle, made applicable to British subjects. These "Moroccan" laws and ordinances might be taxation measures or ordinary legislative regulations. The general position was that Moroccan legislative or fiscal measures were only applicable to British subjects in Morocco if His Majesty's Government had accepted them and consented to their application.[1] These were the essentials of British capitulatory rights in Morocco, and, as has been stated above, a number of other Powers enjoyed similar rights.

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[1] Customs duties (within the treaty limits—see paragraph 4 below) were not held to require regulations to render them applicable to British subjects.

4. The Commercial Convention signed at the same time contains a number of provisions, of which it is only necessary to mention here those limiting import duties on goods imported by British subjects to 10 per cent. *ad valorem*, and those stipulating that only one duty is to be levied on goods imported into any part of Morocco (Article 7), that only one export duty is to be levied on goods exported (Article 8), severely limiting prohibitions and restrictions on imports and exports (Articles 6 and 5), and those granting most-favoured-nation rights. In return for the rights granted under these two treaties Morocco obtained most-favoured-nation rights in British territory. Neither the General nor the Commercial Treaty contained any provision for termination. Several other Powers signed similar commercial treaties with Morocco (in particular the Spanish treaty had the same provision limiting customs duties) and a large number of Powers could claim all these rights under most-favoured-nation provisions.

5. The treaties referred to in paragraphs 3 and 4 above not unnaturally created great difficulties for the Sultan's Government. The two points, which first caused the most trouble, were (1) the grant of "protection" by the capitulatory Powers to persons who were not their nationals and were generally local Moors; this grant attracted to these protected persons all the rights as regards jurisdiction and immunity from legislation and taxation possessed by capitulatory nationals under the treaties. The protection was generally accorded on the ground that the individuals had some employment in connexion with a consulate or that they were trade representatives (*semsars*) in Morocco of merchants who were nationals, but there were great abuses and a very large number of local natives became protected persons of one Power or another; (2) the inability of the Sultan's Government to tax capitulatory nationals or protected persons except by the levy of the limited export or import duties. An agreement of 1863 had been concluded with France dealing with the right of protection (known as the "Règlement Béclard") which became general by the accession of the other Powers, but the abuses continued, with the result that the Sultan appealed to the Powers and a conference was held at Madrid which in 1880 drew up a convention which was accepted by all the capitulatory Powers.[1]

6. The Madrid Convention[2] confirmed, subject to certain modi-

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[1] The United Kingdom, the Netherlands, Austria, Belgium, Denmark, France, Germany, Hungary, Italy, Norway, Portugal, Spain, Sweden, and the United States.

[2] *State Papers*, Vol. LXXI, pp. 639 and 814.

fications and limitations, the Règlement Béclard. It confirmed the immunity from taxation of protected persons who were employees of consulates. It provided that capitulatory nationals might acquire real property, but made this subject to the consent of the Sultan's Government and to the local Moroccan law. It provided that capitulatory nationals should pay an agricultural tax and a gate tax which was to be paid through the consul and to be governed by regulations to be drawn up by agreement between the Shereefian Government and representatives of the Powers in Morocco. It also provided for most-favoured-nation treatment. The regulations with regard to the agricultural tax and gate tax were drawn up during the next year at Tangier, where the diplomatic body in Morocco resided, but in fact the agricultural tax did not become effective till 1913. The gate tax was the subject of further international regulations in 1896. We find here the beginning of the system by which it was sought to remedy, by means of internationally agreed regulations enforced on capitulatory nationals through their consuls, the difficulties created by the inability of the Sultan's Government to legislate for or to tax foreigners.

7. In the years between 1880 and 1904 developments took place which led to the next stage in Moroccan history. The Sultan's Government grew weaker and less able to govern the country. Morocco came more within the orbit of the European Powers and subject to their rivalry. France, pursuing the policy originally welcomed by Bismarck, of obtaining a colonial Empire to make up for the loss of the Franco-Prussian war, and foiled in her ambitions in Eastern Africa after Fashoda in 1898, turned her attention with greater concentration to Morocco. Then in 1904 was signed the Entente Cordiale Agreement between the United Kingdom and Morocco.

8. By the agreement of 1904, in return for corresponding declarations on the part of France with regard to Egypt, the United Kingdom Government recognized "for their part that it appertains to France . . . to preserve order in Morocco and to provide assistance for the purposes of all administrative, financial, and military reforms which it may require. They declare that they will not obstruct the action taken by France for this purpose, provided that such action shall leave intact the rights which Great Britain, in virtue of treaties, &c., enjoys in Morocco. . . ." France declared that she "had no intention of altering the political status of Morocco". The idea was clear: the Sultan was to

continue as the sovereign of all his territory, but the United Kingdom agreed that France should be free to be the protecting Power behind the throne, while His Majesty's Government were to retain the treaty rights which have been referred to above. Another article (Article 4) provided for commercial liberty and equality. Four further articles (Nos. 7 and 8 of the Principal Agreement and 3 and 4 of the additional articles) foreshadowed the creation of the Spanish zone. Spain had claims to the northern parts of Morocco, and the United Kingdom, for strategic reasons, preferred to see the control of the north coast in Spanish hands and wished to prevent its fortification. By Article 7 the two governments "in order to secure the free passage of the Straits of Gibraltar" agreed not to permit the erection of fortifications on the north coast,[1] and, provided that Spain accepted this provision, France was to come to an agreement with Spain under which the latter should exercise influence over a certain area in the north. The two governments promised diplomatic support to each other in the execution of these arrangements with regard to Egypt and Morocco.

9. Article 2 of the additional articles, to which we shall have to refer hereafter, reads as follows:

> "His Britannic Majesty's Government have no present intention of proposing to the Powers any changes in the system of the Capitulations, or in the judicial organization of Egypt.
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> "In the event of their considering it desirable to introduce in Egypt reforms tending to assimilate the Egyptian legislative system to that in force in other civilized countries, the Government of the French Republic will not refuse to entertain any such proposals, on the understanding that His Britannic Majesty's Government will agree to entertain the suggestions that the Government of the French Republic may have to make to them with a view to introducing similar reforms in Morocco."

10. Spain gave her accession to the declaration, and on October 3, 1904, signed with France another declaration in which both Powers expressed their firm attachment to the integrity of the Moroccan Empire under the sovereignty of the Sultan. A convention of the same date between France and Spain fixed (Articles 2, 4, and 5) the boundaries of the sphere of influence which fell to Spain by virtue of her possessions on the Moorish coast of the Mediterranean. In that zone the same right of action was reserved to Spain as was reserved to France by the second paragraph of Article 2 of the United Kingdom–France Declaration of 1904. By Article 9, "la ville de Tanger gardera le caractère

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[1] The "presidios", which were already Spanish territory, were not included in this.

spécial que lui donne la présence du corps diplomatique et ses institutions municipales et sanitaires". This provision foreshadows the Tangier zone.

11. The Anglo-French and Franco-Spanish Agreements of 1904 caused Germany to claim an interest in the Moroccan question, and the visit of the German Emperor to Tangier in 1905 brought about the first Moroccan crisis. This crisis led to the Franco-German Agreements of July 8 and September 28, 1905, which traced the programme of a future conference, the intention of which was that it should "internationalize" the Moroccan question. The conference took place at Algeciras in 1906, and an Act was drawn up, signed by Austria, Belgium, France, Germany, Hungary, Italy, Morocco, the Netherlands, Portugal, Russia, Spain, Sweden, the United Kingdom, and the United States of America.[1]

12. The preamble of the Act of Algeciras embodies the principle of economic liberty and equality (which is referred to again in Article 105): the signatory Powers "inspired by the interest which attaches to the reign of order . . . in Morocco, and having recognized that this desirable end could only be attained by means of the introduction of reforms based upon the threefold principle of . . . economic liberty without any inequality, have resolved", &c. The reforms provided for by the Act relate to various matters which are dealt with in six chapters. Chapter I relates to the organization of the police. Chapter II deals with the suppression of the illicit traffic in arms. Chapter III deals with the creation of a State bank. Chapter IV embodies a declaration concerning an improved yield of the taxes and the creation of new sources of revenue. Article 59 deals with the "tertib". This comprises: "(i) l'impôt des cultures annuelles; (ii) l'impôt des arbres fruitiers; (iii) l'impôt sur le bétail."[2] Article 61 recognizes in principle a tax

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[1] The United States signature (and ratification) was made with a reservation declaring that in subscribing to the regulations and declarations of the Act and in consenting to their application to United States citizens and interests in Morocco the United States Government assumed no obligation or responsibility as to the measures which might be necessary for their enforcement.

[2] The article runs: "As soon as the 'tertib' shall have been regularly enforced on Moorish subjects, the representatives of the Powers at Tangier shall impose it upon their nationals within the Empire. It is, however, understood that the said tax shall not be imposed on foreigners except

"(*a*) Under the conditions prescribed by the regulations made by the Diplomatic Body at Tangier under date of the 23rd November, 1903.

. . . .

"The consular authorities shall retain a proportion of the amount levied upon their on town buildings, a portion of the revenue therefrom to be set aside for municipal roads and hygiene, and generally for improvements and conservancy in towns.[1] Articles 64 and 68 dealt with other taxes which were also to be subject to regulations drawn up by the diplomatic body and collected by the consuls from capitulatory foreigners. Article 66 provided that:

> "As a temporary measure, goods of foreign origin shall, on their entry into Morocco, pay a special tax of 2½ per cent. *ad valorem.* The total revenue derived from this tax shall form a special fund, which shall be devoted to meeting the expenditure on, and execution of, public works undertaken for the development of navigation and trade generally in the Shereefian Empire.
>
> "The programme of the works and the order of their execution shall be settled by agreement between the Shereefian Government and the Diplomatic Body at Tangier."

The article further provided that the moneys belonging to the special fund shall be deposited in the Morocco State Bank, and that public contracts shall be awarded in the form and according to conditions laid down in regulations drawn up by the Diplomatic Body at Tangier conjointly with the Sultan's representative. Chapter V embodies regulations respecting the customs and the suppression of fraud and smuggling. The various articles contain provisions for protecting the Moorish customs against illicit importing and exporting, by measures agreed on with the capitulatory Powers and involving the collaboration of the consular authorities. According to Article 102, every confiscation, fine, or penalty shall be pronounced, in the case of foreigners, by the consular courts, and in the case of Moorish subjects by the Shereefian courts.

13. The Algeciras Act contains no provision as to termination, and, until the convention signed in London in July 1937, none of its provisions were abrogated. Some of them were never put fully into operation as they were overtaken by the changes introduced by later events; others had become in whole or in part virtually

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nationals in order to cover the expenses incurred in drawing up the lists and collecting the tax.

"The rate of such deduction shall be fixed by agreement between the Makhzen and the Diplomatic Body at Tangier."

[1] The article also states:

"Regulations made by common agreement between the Shereefian Government and the Diplomatic Body at Tangier shall fix the rate of the tax, lay down the manner of collecting and applying it, and determine what proportion of the resources thus created shall be devoted to meeting the cost of improvements and of conservancy in the towns.

"At Tangier such proportion shall be paid to the International Sanitary Council, which shall determine the manner of its application until a municipal organization shall have been created."

obsolete by 1937; others remain in full force. The main features are clear. The administration and finances of Morocco are to be assisted by agreed laws and taxes enforced on and collected from foreigners through their consuls. The old treaties are retained; most-favoured-nation treatment is affirmed;[1] there is to be liberty and equality in commercial matters.

14. It has been said that the intention of the Act of Algeciras Powers was to internationalize the Moroccan question, but in effect France found herself free in the main to settle the lines of her Moroccan policy. However, disorders in Morocco hindered its application and various incidents brought Germany into the diplomatic field. In February 1909 a Franco-German Declaration was signed; in this instrument France affirmed her attachment to the integrity and independence of the Shereefian Empire and the principle of economic equality, and abjured any intention to hinder German commercial or industrial interests; Germany declared her interests were economic only and recognized that France's political aims were connected with the establishment of peace and order and abjured any intention to hinder these aims.

15. In 1911 anarchy in Morocco rose to a head, and the Sultan, besieged in Fez, appealed to France for assistance. A French expeditionary force marched on Fez and raised the siege. Germany now renewed her claims to a voice in Moroccan affairs, and the dispatch of a German gunboat to Agadir brought about the second Moroccan crisis. Negotiations followed between France and Germany which resulted in the important convention of November 4, 1911.

16. The Franco-German Convention of 1911 was similar to the Declaration of 1909, but went rather further. France gave more explicit undertakings with regard to commercial equality and non-discrimination.[2] Germany undertook not to obstruct action by France directed to assist the Moroccan Government in introducing administrative, financial, and military reforms necessary for good government and such new regulations and amendment of old regulations as these reforms might require, including matters dealt with by the Act of Algeciras. Germany would have

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[1] It is sometimes contended that the effect of what was done was to embody all the old bilateral treaties in the general instrument so that the agreement of the original parties could not abrogate them. This argument is put forward with most force with regard to the provisions limiting customs duties to 10 per cent.—raised by 2½ per cent. by Article 66—and is supported on the minutes of the conference as much as on the text of the Act. No opinion is expressed here as to the soundness of this contention.

[2] Articles 1, 4, and 6.

no objection to France assuming the protectorate of Morocco or effecting such military occupations as the maintenance of order might require (Article 2 and explanatory note). The introduction of a judicial reform inspired by the principles generally adopted in the legislation of the Powers was envisaged to replace eventually, after agreement with the Powers, the consular courts (Article 9), German nationals being placed on exactly the same footing as French nationals; reforms with regard to foreign protégés and the revision of the Madrid Convention were also adumbrated. The other Algeciras Powers were invited to accede to the convention, and they all did so.[1] The accession of the United Kingdom was made on the understanding (1) that the provisions of the Entente Cordiale Agreement of 1904 were not affected, in particular the provision against the fortification of the north coast; (2) that British subjects would receive most-favoured-nation treatment; (3) that adequate arrangements would be made for placing the town and municipal district of Tangier definitely under municipal control (a second and more explicit foundation of the future Tangier zone, which was still to wait a long time for its realization).

17. The conclusion of the convention of 1911 with Germany left France free to enter into negotiations with the Sultan for the conclusion of a protectorate treaty and with Spain with regard to the Spanish zone of influence. The first of these was signed on March 20, 1912, and the second on November 27 of the same year. The protectorate treaty declared that France would agree with Spain as regards Spanish interests arising out of its geographical position and that Tangier should maintain its special recognized character. It provided that the measures which the new protectorate régime should require should be enacted by the Sultan on the proposal of the French Government and that the French Government should be represented by a Resident Commissioner-General by whom the powers of the French Government under the treaty should be exercised, and that the Resident should be the sole intermediary between the Sultan and the representatives of foreign Powers and competent in all matters affecting foreigners. French diplomatic missions and consulates should undertake the protection of Moroccan interests abroad and the Sultan should conclude no treaty without the assent of the French Government.

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[1] The United States did not actually accede; they dissociated themselves from political parts of the declaration as a matter with which they were not concerned and raised no objection to the other parts.

18. The treaty with Spain fixed the limits of the zone of Spanish influence, and the French Government agreed that in this zone the Spanish Government should exercise the powers which the French Government exercised in the rest of Morocco. The zone remained under the civil and religious authority of the Sultan. A "Khalifa", chosen by the Sultan from a list of persons submitted by the French Government, resided at Tetuan as the Sultan's representative exercising the Sultan's rights. The Spanish Government were to have a High Commissioner. Tangier and its surrounding zone, which was defined, was to have a special régime to be decided later. The Spanish zone was separate financially, receiving all taxes and duties collected there and having no claim on the Shereefian Government for its expenses. Each zone was to receive the customs duties collected in its ports, but the Tangier customs receipts were to be divided. Representatives of the customs administrations of the two zones were to meet periodically at Tangier in order to agree on the measures necessary to assure unity in the application of tariffs. All modifications in customs duties were to be agreed. The reformed judicial system, to which the Franco-German Convention referred, was to be set up by the French in their zone and by the Spanish in the Spanish zone, and the French Government agreed to accept the Spanish courts in the Spanish zone for French nationals when other Powers did so, and *vice versa*.

19. In December 1914, after the French Government had formally recognized the British protectorate over Egypt which was declared when Turkey entered the War, the United Kingdom formally recognized the French protectorate by adhering to the Protectorate Treaty of March 1912. No similar formal act was taken with regard to the Spanish zone, but the United Kingdom accepted the Spanish position there.

We have now reached a stage at which the protectorate and the French and Spanish zones of Morocco have been created and it has been agreed that some international régime shall be created for the Tangier zone in the future.

20. From the practical point of view the French and Spanish zones are nearly in the position of separate countries, France being responsible internationally for one and Spain for the other. In the French zone there is the Sultan who reigns but does not rule. His Ministers and civil service are the French Commissioner-General and his staff. Legislation (*dahirs*) is settled and drawn up by the French authorities and signed by the Sultan; administrative decrees are issued by the French authorities as the Sultan's

Ministers. The French consular court disappears and is replaced by tribunals on the French model, staffed by French judges and applying legislation drawn up generally on the French model. These tribunals have jurisdiction in cases in which French nationals are concerned and in cases in which foreigners are concerned which would previously have gone before the Kadi.[1] It was intended that they should also have jurisdiction over cases which came before the foreign consular courts, and such cases were transferred to them as and when the various Powers relinquished capitulatory rights. In the Spanish zone there is an equivalent régime, with the substitution for the French Commissioner-General and his staff and the French courts of the Spanish High Commissioner and his staff and the Spanish courts. On the other hand, the unity of the country persists in the rights of sovereignty of the Sultan over the whole territory and in the fact that France and Spain only govern as protecting Powers and that the territory is not French or Spanish territory. It further persists in the fact that all the treaties and conventions previously concluded, bilateral and multilateral, apply to both zones and in the right of the other Powers under these conventions to most-favoured-nation treatment in both zones including equality of treatment with French and Spanish nationals and interests. Further, though financially the two zones are separate, there is a customs unity. As a result of the old treaties, when goods are admitted to any part of the country they pay one customs duty and no further customs duty can be levied, even though they pass from one zone to the other; and arrangements also exist, as has been seen, under which the customs duties are fixed by agreement between the authorities of the two zones and their proceeds divided.

21. In June 1914 Switzerland renounced capitulatory rights in the French zone in return for a further assurance that equality of treatment flowing from the Act of Algeciras and other conventions should be maintained and that all agreements between France and Switzerland should apply to the French zone, in default of agreement to the contrary and to the extent that such agreements were not inconsistent with the Act of Algeciras and the other pre-existing Moroccan treaties. In the years which followed, all the Algeciras Powers, except the United Kingdom and the United States of America, surrendered their capitulatory rights, sometimes in return for assurances similar to those received

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[1] For native cases—particularly cases involving the application of religious law—the native tribunals remained, though they too have undergone some reorganization.

by Switzerland. By agreements with Spain the same Powers surrendered their capitulatory rights in the Spanish zone. As a result of the peace treaties Germany and Austria-Hungary lost all their treaty rights in Morocco, both capitulatory rights and those providing for equality of treatment in commercial matters. They ceased to be "Algeciras Powers". In 1919, at a time when the British protectorate of Egypt still continued and there were proposals for setting up in Egypt new courts which should replace the mixed and consular courts in that country, negotiations took place between France and the United Kingdom under which British capitulatory rights in the French zone of Morocco would be abolished. These negotiations were never completed because the proposals as regards Egypt were abandoned.

22. The French Government urged that the United Kingdom was obliged to surrender its consular courts and capitulatory rights in the French zone because it had acceded to the Franco-German Convention of 1911; and further that there was no justification for the maintenance of these courts and rights in a country which was governed on modern lines by France. While there was some force in this view, the Franco-German Convention created no precise obligation to surrender consular courts and certainly not at any particular time. Further, accession to the Franco-German Convention was on terms which preserved intact the Entente Cordiale Agreement of 1904 which established a connexion between French capitulatory rights in Egypt and those of the United Kingdom in Morocco. It was true that there was an obligation resulting from the Franco-German Convention not to prejudice good administration and obstruct the reforms which France would introduce in the country. This requirement, however, was complied with when the United Kingdom agreed to the revision of old international regulations which required revision, and applied by King's Regulation and enforced through the consular court such other legislation as good government required. Throughout this period the United Kingdom made King's Regulations applying the greater part of the legislation which was enacted in the zone. Requests from the French authorities for the application of legislation were only refused when it was considered that the legislation in question conflicted with treaty rights which remained in force (in most cases because the provisions were in effect, if not in intention or on the face of them, discriminatory in that they were framed in such a way as to be more favourable to French commercial interests). On occasion His Majesty's

Government waived in respect of particular measures their treaty rights, and applied legislation which contravened the provisions of treaties. It is not unnatural that difficulties and differences of opinion should occur from time to time over the application of legislative and fiscal measures, particularly when legislation of a kind which necessitated the enactment of a King's Regulation to render it applicable to British subjects was passed without prior notice to the British consular authorities, and that delays ensued while discussions took place on the question of its application or slight modification before application.[1] From time to time during these difficulties the French Government went so far as to contend that the effect of the Franco-German Convention was to a greater or lesser extent to abrogate the capitulatory right to immunity from legislative measures unless they were expressly accepted and applied. This contention, though produced at various times in time of difficulty, was clearly legally unsound and was never persisted in to the end, and the question was always settled.[1] Similar questions arose with the Spanish authorities in the Spanish zone.

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[1] Paragraph 1 of the minute attached to the Convention signed in July 1937 illustrates this point. It reads as follows:

"Upon the promulgation of the projected Arrêtés Viziriels, referred to in the note of the 26th April, 1937, from the Residency-General at Rabat to His Majesty's Consul-General at that city, which will modify the Arrêtés Viziriels of 1933 so as to allow motor transport enterprises in the French zone of the Shereefian Empire to insure their vehicles and their employees with different companies, His Majesty's Government will forthwith cause a King's Regulation to be made applying to British subjects, British-protected persons and British companies, the provisions of the legislation governing transport in the French zone of the Shereefian Empire.

"They will also, upon the promulgation in the French zone of the projected legislation regarding the insurance of motor vehicles, at once cause a King's Regulation to be made applying this legislation to British subjects, &c., subject to such reservations as have already been agreed upon.

"It is possible that the point arising on Article 17(*g*) of the projected Vizerial decree on insurance of motor vehicles may have to be the subject of further discussion, but there should be no difficulty in settling this point long before January 1938."

The legislation governing transport referred to was a series of provisions regulating transport by road, in view of the unsatisfactory conditions under which it was carried on, the excessive competition, and the detriment to the railways. His Majesty's Government were always willing to apply it by King's Regulation provided a few amendments in the interests of vested British interests were made, and over these there was no great difficulty. It was connected, however, with other legislation respecting motor insurance which in its original form discriminated in fact against the operations of British insurance companies. These insurance points proved very difficult and the discussions dragged on for four or five years. During this time the motor transport legislation was applicable to every one in the zone except British subjects, who were still unregulated, and, not unnaturally, numerous motor transport enterprises started under the nominal ownership of British "men of straw". Some retrospective application of the legislation was necessary and justifiable provided that the legitimate interests (motor transport and insurance) were safeguarded, but by reason of Article 3 the French authorities could not do this even when the capitulations were gone. Therefore it was agreed that between the dates of signature and ratification of the convention (1) the French authorities would make certain amendments to the legislation, and (2) His Majesty's Government would render it applicable by King's Regulation.

23. The Tangier zone was created by a convention signed in December 1923 and ratified in May 1924 by the United Kingdom, France, and Spain. In 1928 it was amended and Italy came in on the footing of a signatory Power. The convention was open to the accession of the Algeciras Powers and all of them except the United States acceded.[2] The legislative action by the Sultan of Morocco bringing the new régime into actual operation took effect in June 1925. Its boundaries are those fixed in the Franco-Spanish Convention of 1912 (paragraph 18 above). The Tangier zone is placed under a régime of permanent neutrality. The Tangier zone remained a part of the dominions of the Sultan and the Sultan had a personal representative styled the Mendoub. The administrative officials and police are of French, Spanish, British, or Italian nationality. There are detailed provisions as to how they are to be chosen. Legislation in the zone is passed by a legislative assembly composed of 9 subjects of the Sultan nominated by the Mendoub and 17 foreigners chosen by the consuls (4 French, 4 Spanish, 3 British, &c.). A Mixed Court composed of Belgian, British, Spanish, French, and Italian judges takes all cases in which foreigners are parties, and capitulatory rights are surrendered.[3] The zone was started on its career with a number of

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[1] Letter No. 5 attached to the Convention of 1937 illustrates a similar source of difficulty. Land belonging to British subjects was from time to time expropriated or subjected to servitudes for public utility purposes under protectorate legislation which had not been applied to British subjects and under conditions which did not conform with the relevant provisions of the Act of Algeciras. The French Government purported to justify their action on the ground that as the result of the provision of the Madrid Convention (para. 6 above) the holding of land by capitulatory foreigners was subject to the local law and therefore to the legislation with regard to the expropriation of land. This contention, though never abandoned, was never persisted in to the end, and negotiations with regard to compensation took place between the British consul and the French authorities which sometimes settled the case and at other times dragged on. There were a number of such cases outstanding in 1937, and Letter No. 5 provides for their immediate settlement, M. Cordier, the President of the Court of Appeal at Rabat and leader of the French delegation which negotiated the treaty, being called in to give his opinion on the amount of compensation payable if agreement could not otherwise be reached; these cases have now been satisfactorily settled.

[2] Russia was a party to the Act of Algeciras though she had never possessed capitulatory rights in Morocco. She seems to have tacitly dropped out of the ranks of Algeciras Powers since the War and did not accede to the Tangier Convention.

[3] Thus only the United States now possesses capitulatory rights in Tangier. There are, of course, very few United States nationals in the whole of Morocco.

legislative enactments by the Sultan which had been agreed beforehand by the Powers signatory to the convention, viz. the constitution (organic *dahir*), the constitution of the Mixed Court, the constitution of the police force, seven codes, and a certain number of French zone enactments which were enumerated in the convention as applicable in the Tangier zone. There are special provisions restricting the power of the legislative assembly with regard to the amendment of these enactments.

24. The Tangier zone remained bound by existing treaties applicable to Morocco save in so far as the Tangier Convention provides expressly to the contrary. The Act of Algeciras and all the provisions with regard to economic liberty and equality apply, as also the provisions limiting customs duties. Future international agreements concluded by the Sultan only extend to the zone with the consent of the international assembly. International agreements, however, to which all the Algeciras Powers are parties apply automatically to the zone. The "committee of control" consisting of the consuls of all Powers who are parties (by accession or otherwise) to the Tangier Convention is entrusted with the duty of ensuring that the provisions of the Tangier Convention and the treaties are observed. It has the power to veto legislation which is contrary to these instruments. Diplomatic questions between the zone and foreign Powers are dealt with through the French Resident-General at Rabat as the Sultan's foreign minister, and the French Government and its diplomatic representatives abroad.[1] The natives of the zone enjoy French protection in foreign countries. Morocco with its three zones remains a unity for customs purposes and there are provisions for dividing the customs receipts, and the modification and application of the customs tariff becomes a question for discussion between the representatives of the three zones. The Tangier zone is a separate entity for fiscal purposes with power to raise money by taxation in the zone. In all three zones by far the greater part of the revenue is raised by indirect taxation. Owing to the treaty limitation on customs duties (i.e. 10 per cent. *ad valorem*+$2\frac{1}{2}$ per cent. added by the Act of Algeciras) in all three zones much of the revenue is raised by internal duties, generally called "consumption duties", i.e. duties on all goods of a certain kind put

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[1] As an example see Article 17 of the commercial treaty of 1938 referred to in paragraph 1 above. The extension of this treaty to Tangier is to be notified through the French ambassador in London by the French Government, acting in the name of the Sultan.

into consumption in the zone whether locally produced or imported. Where the goods on which the consumption duty is levied are not produced locally the internal duty is in effect only a customs duty or an extra customs duty under another name. Each zone enforces its own separate internal duties, and for this reason, in spite of the customs unity, there are, in effect, customs barriers between the three zones.

25. After the Treaty of Alliance with Egypt, in which the United Kingdom had undertaken to give its diplomatic support to Egypt in obtaining the agreement of the Powers to renounce their capitulatory rights in Egypt, it was only to be expected that France would make her agreement conditional on the abrogation of British capitulatory rights in Morocco. In view of the provisions of the 1904 agreement[1] this request could not be resisted, but there were various questions in this connexion to be arranged. A French delegation led by M. Cordier, First President of the Court of Appeal at Rabat, came to London in July 1937, and the convention signed on July 29 was the result.

26. The Convention of July 1937 is between the President of the French Republic "acting in his own name and on behalf of the Sultan of Morocco" and His Majesty the King "for Great Britain and Northern Ireland". The commercial treaty of July 1938 is between the same parties similarly described except that the President of the French Republic is only "acting on behalf of His Majesty the Sultan of Morocco". The treaties and conventions which were abrogated or amended by the 1937 convention were for the most part treaties between the United Kingdom and the Sultan, but some of them were also between the United Kingdom and France and other Powers (such as the Act of Algeciras and the Madrid Convention). The 1937 Convention also deals with Zanzibar, which is no concern of the Sultan but only of France. Therefore France is a party not only as representing the Sultan but also in her own person. The Treaty of 1938 abrogated a Treaty concluded with the Sultan alone.[2] In view of the fact that the treaty rights abrogated or modified by both the Convention of 1937 and the treaty of 1938 flowed from pre-War instruments applicable on the British side to the whole Empire, and that

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[1] See paragraph 9 above.

[2] Some of the notes, however, exchanged at the same time as the Treaty of 1938 with the French Government relate to Conventions to which France as well as Morocco were parties, e.g. the Act of Algeciras. The Sultan of Morocco still on occasion participates in treaties directly in his own name, generally multilateral conventions, postal conventions, and the like.

the new conventions were concluded with His Majesty in respect of the United Kingdom only, the consent of the Dominions and India to the changes was given by notes. In the case of the 1937 Convention notes were addressed to the French Government on behalf of all those governments accepting the provisions of the convention, on the understanding that the Dominion Government concerned could claim the same rights under the convention as the Government of the United Kingdom.[1]

27. The preamble of the Convention of 1937 reads:

> "Whereas the present special régime applicable in the French Zone of the Shereefian Empire to British consuls, nationals, and institutions is no longer in accordance with the present stage of that zone;
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> "And whereas His Majesty The King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India, in view of the convention signed at Montreux on the 8th day of May, 1937, relating to the abolition of the Capitulations in Egypt, desires to give effect as regards the French Zone of Morocco to the Declaration of the 8th April, 1904, relating to Egypt and Morocco;
>
> "And whereas both High Contracting Parties are also desirous of modifying certain treaties applicable to Zanzibar so as to render them more in conformity with existing conditions."

28. Under Article 1 His Majesty renounces all rights and privileges of a capitulatory character in the French zone of the Shereefian Empire. Capitulatory rights in the Tangier zone had already gone. The position in the Spanish zone remains unaffected. The conclusion of a convention with Spain will be required and this convention must be concluded with a Spanish government which both possesses *de facto* authority in the zone and is recognized as the *de jure* government of Spain. Article 2 provides that British subjects, British protected persons, and British companies shall in the French zone be subject to the jurisdiction of the same tribunals as French citizens and companies (i.e. the French courts referred to in paragraph 20 above and not the native courts). It also provides that (for ten years and also for as long after that as subjects of the Sultan and companies incorporated in the French zone enjoy most-favoured-nation rights in the United Kingdom in this respect) they shall in their recourse to these tribunals enjoy the same conditions as French citizens and companies. Article 3 prevents the retro-active application to British subjects of French zone legislation which had not previously been applied to them by King's Regulation. Of course, for the future such legislation applies automatically whether enacted before or after the convention. Article 4 provides that the British consular court shall con-

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[1] As regards the 1938 Treaty see paragraph 35 below.

clude pending cases and that the decisions of the court shall have the force of *res judicata.* Article 5 combined with Letter No. 3 attached to the Convention prevents for the future the conferring on any Moorish nationals of British protection (i.e. there are to be no more semsars, &c.), but then provides that those who have already been given that status shall, like British subjects, enjoy the jurisdiction of the French tribunals and that the British consulate may take up where necessary their grievances with the protectorate authorities. Article 6 provides for the closure of the British post offices in the zone. Article 7 lays down that British subjects, &c., shall enjoy in the French zone the same personal and private rights as French citizens and the same guarantees for the protection of person and property, and paragraph 3 of a minute attached to the Convention refers to a *dahir* of August 12, 1913, which is the foundation of these rights. Article 8 exempts British subjects and British protected persons from military service. Article 10 provides that British consular officers in the zone shall have the same rights and privileges as British consuls in France and not less favourable treatment than any other foreign consuls. Article 11 deals with British schools in the zone, Letter No. 1 with missionaries, and Letter No. 7 with British Chambers of Commerce. Article 12 lays down certain conditions limiting the deportation of British subjects and British protected persons who have resided in the zone for five years or more. Article 13 continues (subject to determination after twenty years) the right of British consular officers to deal with the estates in the zone of deceased British subjects and British protected persons, but any disputes relating to these estates are to go before the courts. Article 14 provides that a French decree of 1921 which confers French nationality in certain conditions upon persons born in the zone and a *dahir* of the same date conferring Moorish nationality under certain conditions shall not apply to British subjects or British protected persons *already born*, and if in the future further decrees or *dahirs* confer French or Moorish nationality on the basis of birth or residence in the zone in cases where these two enactments do not confer it, British subjects or British protected persons shall have the right on majority to divest themselves of such nationality. The application of these decrees in Morocco and similar decrees in Tunis soon after the War led to a dispute between His Majesty's Government and the French Government which was brought before the Council of the League and came before The Hague Court for an advisory opinion. In the case of

Tunis the matter was settled by an exchange of notes. In the case of Morocco the dispute was found to be academic at the time because by their own terms the decrees did not apply to the children of British subjects and British protected persons *so long as British capitulatory rights were maintained.* It became therefore necessary to settle the question at the time when these rights were given up.

29. Article 16 abrogates the provisions of all earlier Acts, treaties, and conventions which are inconsistent with the preceding articles, and paragraph 4 of the Protocol of Signature enumerates a number of provisions which are so abrogated, namely most of the General Treaty of 1856, and (so far as His Majesty is concerned) a good deal of the Act of Algeciras (see paragraph 12 above), viz. the chapters with regard to the police (i); arms traffic (ii); the State Bank (iii) (except three articles); most of the provisions relating to the improvement of the collection of taxes and new sources of revenue (iv); but the provisions of Articles 66, relating to the extra 2½ per cent. customs duty, and 67, relating to export duties, 68, export of cattle, 69, cabotage, are left, and so are one or two other provisions. Some but not all of the provisions of Chapter V relating to the "Règlement sur les douanes",[1] and part of Chapter VI relating to the public services and public works are left, and the rest abrogated. His Majesty renounces all rights under the Madrid Convention (see paragraph 6 above). Paragraph 5 records that as regards provisions in earlier treaties, &c., not referred to in paragraph 4, each High Contracting Party reserves his respective point of view as to whether they can be held to be operative or not. The position with regard to some of the provisions of the Act of Algeciras not so mentioned is complicated (see paragraph 13 above); some of them are partially but not wholly in force. It is certain, however, that all the provisions of all the instruments with regard to economic equality and liberty remain (see paragraph 30 below).

30. Paragraph 2 of the Protocol provides:

"... Declare, with reference to Article 7, that the present convention in no way affects the treaties in force under which in the French Zone of the Shereefian Empire,

"(*a*) British subjects, British-protected persons and British companies enjoy equality of treatment with French citizens and French companies in the matter of rights concerning movable and immovable property, mining rights, the exercise of professions, commerce, business and industry;

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[1] Paragraph 5 of the minutes attached to the Convention provides that when the negotiations are held later with regard to the commercial treaty in accordance with Letter No. 9 (see paragraph 31 below) the remaining provisions of this *règlement* shall be considered; this was done (see paragraph 33 below).

"(*b*) British ships enjoy equality of treatment with French ships;

"(*c*) British subjects, British-protected persons and British companies enjoy equality of treatment in matters of taxation with French citizens and French companies."

The treaties referred to are the Agreement of 1904, the Act of Algeciras, and the Franco-German Convention. The provision is useful, however, not merely as showing that these provisions are unaffected, but also as stating that these particular rights result from them.

31. Letter No. 9 attached to the convention reads as follows:

> "I have the honour to inform Your Excellency that His Majesty's Government in the United Kingdom agree with the French Government in recognising that the conditions laid down in Article 14 of the Commercial Treaty of 1856 for the denunciation of that treaty no longer correspond with modern conditions, and being equally desirous of revising the said treaty, agree that it is opportune to begin negotiations for the purpose of establishing the commercial relations between Great Britain and Morocco on a new basis corresponding to the respective economic interests of the contracting parties.
>
> "The new commercial treaty shall be based upon the principles of reciprocity and shall replace the Commercial Treaty of 1856."

The general nature of the commercial convention of 1856 has been referred to in paragraph 4 above. It was certainly largely non-reciprocal and its rather antiquated provisions, in particular the general limitation of customs duties, were a severe fetter on the administration. Its provisions were of the kind commonly concluded in the first half of the century with the Ottoman Empire, very often in the same treaty as contained the capitulatory rights, and, like capitulatory treaties, the provisions were permanent. In the case of the Ottoman Empire and Egypt the commercial provisions of this kind were modified by later agreements before the abrogation of the capitulations. While His Majesty's Government could not agree with the French view that their rights under the commercial convention were capitulatory rights which they were under an obligation to surrender—capitulatory rights were consular jurisdiction and immunity from local legislation—they were ready to negotiate a new treaty to replace the 1856 commercial convention on modern reciprocal lines, but containing provisions necessary for safeguarding United Kingdom commerce from the effects of abrupt changes.

The remainder of the provisions of the 1937 convention relate to Zanzibar, and need not, therefore, be described in detail in connexion with the abolition of the capitulations in Morocco.

32. The first point to be noted about the Morocco Commercial Treaty of 1938 is that, though like the convention of 1937 it applies to the French zone, it is provided (see preamble and Article 17) that it shall be extended to the Tangier zone if the International Legislative Assembly of Tangier should approve. The capitulatory rights which it was the object of the convention of 1937 to remove had already disappeared in Tangier, and the assurances given in return were already secured there, by the Tangier Convention and international régime. Tangier, therefore, was not concerned with this Convention. The Commercial Convention of 1856, however, still applies to Tangier and therefore its various restrictions still apply there. Moreover, unless the customs unity of the three zones is to be broken, the French zone could not enjoy the customs freedom which it is one of the aims of the Treaty of 1938 to secure, if the Tangier zone is not also freed from the Convention of 1856. On the other hand, the Treaty of 1938 could not be made applicable to Tangier unless the Legislative Assembly approved, and if it did not, then if Tangier had been included *ab initio* the treaty could not be ratified and apply to the French zone. Therefore, a possibility of its subsequent extension to the Tangier zone was provided for, but unless notification of extension is given, the 1856 Convention continues to apply to Tangier (see paragraph 1 of the Protocol of Signature).

33. The Treaty of 1938 abrogates the Commercial Convention of 1856 in respect of the French zone (and the Tangier zone if the Treaty is extended to Tangier) so far as the United Kingdom, British colonies, and overseas territories are concerned,[1] but does not affect any rights based on any other treaties, multilateral or bilateral. The 10 per cent. limit on customs duties therefore goes, but there are provisions under which particular kinds of imports from the United Kingdom are not to be subject to customs duties higher than those specified (Article 3: Schedule A—the schedule is a long one), and similar provisions relating to imports from the colonies and overseas territories if the treaty is extended to them under the article providing for such extension. In return there are corresponding provisions relating to certain imports from the French zone into the United Kingdom. Another article (Article 11) provides that internal duties shall not create a more burdensome charge upon imports from the territory of one party than upon goods of local origin, and Letter No. 2 states that the effect of the consolidation of customs duties agreed to in Article 3

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[1] As regards India and the Dominions, see paragraph 35 below.

is not to be prejudiced by increases in internal duties. These provisions only begin to operate as and when the zone actually makes use of the liberty acquired to raise customs duties over the old treaty limit. Paragraph 4 of the Protocol of Signature adds further precision on this point. The remainder of the provisions of the treaty are similar to those found in a commercial treaty of the ordinary type concluded by the United Kingdom. There are many reciprocal most-favoured-nation provisions. Article 14 makes it clear that "imperial preference" is safeguarded on the British side and interzonal preference on the Moroccan side. Paragraph 3 of the Protocol makes it clear that unconditional most-favoured-nation treatment is intended and safeguards certain existing arrangements on the Algerian frontier. There are no "establishment provisions", this matter being adequately covered, so far as British subjects in the French zone are concerned, by the 1937 convention and, so far as Moorish nationals of the French and Tangier zones in British territory are concerned, by their position as French *ressortissants*, whereby they benefit by the French treaties. The Treaty of 1938 is terminable by notice after seven years.

34. As in the case of the Convention of 1937, a new treaty to replace the 1856 Convention as regards the Spanish zone can only be negotiated with Spain, but here again, unless the customs unity of the three zones is to be broken (which *inter alia* would involve many new arrangements in view of the existing provisions for the division of customs receipts), the French zone would, unless some special arrangement were made, have to wait in order to reap the benefits of the "customs freedom" until negotiations between the United Kingdom and Spain could be held (as in 1937 and 1938 they could not be) and successfully concluded. Therefore paragraph 1 of the Protocol of Signature provides:

> "The aforesaid treaty in no way affects the application of any treaties, conventions or agreements to the Spanish zone of influence of the Shereefian Empire. In particular, it does not prejudice the application to this zone of the Convention of Commerce and Navigation signed at Tangier on the 9th December, 1856. As, however, they desire to render possible the levy, as in the past, of Customs duties at the same rates in the French zone and in the Spanish zone of influence, His Majesty's Government in the United Kingdom declare that, notwithstanding Article 7 of the aforesaid Convention of 1856, they will not object to the levy in the Spanish zone of influence of Customs duties at rates equal to those at which they are levied in the French zone under the conditions laid down in the present treaty. It is, however, understood that this waiver by His Majesty's Government in the United Kingdom of their right to invoke the aforesaid Article 7 in the

Spanish zone of influence is conditional on the maintenance of the existing situation with regard to the uniformity of Customs tariffs in the French zone and in the Spanish zone of influence."

35. It was pointed out in paragraph 26 above that the assent of the Dominions and India is also required to the changes in existing treaty rights under pre-war treaties applicable to the whole empire. Up to the date of writing,[1] diplomatic notes to this effect have been addressed to the French Government on behalf of Australia, New Zealand, and India. In these notes assent is given to the abrogation of the Convention of 1856 as between the French and Tangier zones on the one hand and the Dominion or India on the other hand, with effect from the entry into force of the said treaty as regards the French and Tangier zones respectively. It is also placed on record that the agreement of the Government of India or of the Dominion, as the case may be, to the abrogation of the Convention of 1856 in no way prejudices the right which that government can claim under the provisions in force of any other international instrument, and in particular the rights and economic liberty without any inequality or differential treatment, which it can claim under the Algeciras Act or the Franco-German Convention of 1911. Then follows a paragraph as regards the Spanish zone and customs unity following closely paragraph 1 of the Protocol quoted in the previous paragraph.[2]

36. In Note No. 5 attached to the Treaty of 1938 it is stated that the Government of the United Kingdom, having been informed by the French Government that the provisions of Chapter V of the Act of Algeciras entitled "Regulations respecting the Customs of the Empire"[3] are out of keeping with modern conditions, and the French Government having communicated certain provisions which it is their intention to incorporate in the customs legislation of the French zone, the Government of the United Kingdom agree for their part to the abrogation as regards the French zone of the provisions of this chapter, provided that for a period of seven years (1) the new regulations in the zone shall

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[1] December 1938.

[2] It would appear that in order that the French and Tangier zones may enjoy the freedom from the 10+2½ per cent. limit in customs duties, the assent of Spain will have to be obtained, because Spain had a similar provision in her commercial treaty with Morocco, but perhaps Spain will have no reason to withhold it in view of the fact that the Spanish zone becomes similarly released. Whether the consent of the other Algeciras Powers is necessary or not depends upon what is the correct view on the point referred to in the footnote to paragraph 13 above.

[3] See paragraphs 12 and 29 above.

conform to those communicated by the French Government and annexed to the note, and (2) no modification in the customs regulations shall take effect as regards importations effected by British subjects or imports from the United Kingdom, &c., unless they are also applied to importations effected by nationals of all countries and to goods from every origin. The annexed regulations are detailed provisions as to how the value of goods is to be ascertained for customs purposes, but of course include no provisions for enforcement through the consuls. At the date of writing, similar notes have been communicated to the French Government on behalf of Australia, New Zealand, and India, agreeing to the same changes. All these notes say that, in view of the customs unity, objection to the introduction of new customs regulations in the Spanish and Tangier zones is also waived upon the same condition. The assent of all the Algeciras Powers will be required before this change can come into force.

37. Note No. 3 attached to the treaty of 1938 deals with the introduction in the French zone of the quantitative regulation of imports, that is to say, of the system in force in many countries to-day whereby the total quantity of various named commodities to be permitted to be imported into the country in the year is fixed, and then this total quantity is parcelled out amongst the exporting countries. It is possible for a quota system to be perfectly consistent with most-favoured-nation treatment provided that the basis upon which the quotas are allocated is a fair and uniform one. On the other hand, the quantitative limitation of imports in the French zone of Morocco is clearly not consistent with the provisions of earlier instruments, such as the Act of Algeciras and the Franco-German Convention of 1911 with regard to liberty of commerce. In Note No. 3 the Government of the United Kingdom consent to the introduction of a quota system into the French zone in an express waiver of their rights under these instruments, while reserving these rights except to the extent expressly stated. This waiver is given on certain conditions which are set out in detail in the note and in the annexes. The conditions relate to most-favoured-nation treatment and also lay down that if any quota measures are introduced they shall be introduced in regard to certain articles which are specified and that a certain previous period, which is given, is to be taken as the basis for the allocation of the quotas, and it is then provided that in respect of certain other articles, which are also specified, no quantitative regulation shall be introduced. The putting into

effect of these proposals will require the assent of the Dominions, of India, and of the other Algeciras Powers, but up to the date of writing no instruments have been published giving this assent. It has, however, been stated that negotiations are going on between the French Government and the United States Government, both with regard to capitulatory rights and with regard to commercial matters in Morocco.

THE JURIDICAL BASIS OF HOT PURSUIT

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THE incentive to writing this paper came from an inquiry into the ancient common-law doctrine of "fresh pursuit". As it seems to me, this doctrine is not without a lesson for the international lawyer. For one thing it presents some interesting affinities with his own rule of "hot pursuit". But much more important than this similarity of detail is the broad juridical basis on which it is rested, which invites the question whether there is any such comprehensive theory in international law. What I propose to do, therefore, is to make a comparative study of the two rules. I shall first state the English theory as briefly as possible, and then assess the extent to which international law is reaching or may reach the same result.

Before embarking on this, however, it may be well to say at once that the juridical basis of "fresh pursuit", to which reference has just been made, involves something of a fiction. It pretends that an act occurred at one place although in fact it occurred at another. Such a rule immediately recalls two other fictions of a similar nature that are already established in international law. The first is now a commonplace; it is the rule, recognized in England for several centuries, that an act is deemed to be committed not only where the physical movements occur but also where the consequences take effect.[1] Perhaps, after all, this is not so much a fiction as an extended definition of the term "act", but, however analysed, it seems to work well in questions of jurisdiction and was approved by a majority of the Permanent Court in the case of the s.s. *Lotus*. The other is the fiction of "constructive presence", which is applied where a vessel, lying outside the limit of territorial waters, makes contact with a spot within this limit by means of her own small boats (or, according to the courts of the United States, by means of boats sent out from the shore under her control). According to the preponderance of authority such a vessel is taken, for the purposes of neutrality and jurisdiction, to be herself within the limit.[1]

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[1] A few dates may be of interest. (1) In the law of venue the rule goes back at least to *Anon.* (1593/4), 1 Dyer 50b, n., 73 E.R. 111; for the full rules see Halsbury's *Laws of England*, 2nd ed., pp. 66–70. (2) It was applied to the jurisdiction of the Court of Admiralty in *R.* v. *Coombes* (1786), 1 Leach 388, 168 E.R. 296, 1 East *P.C.* 367. (3) Its appearance in extradition cases is more recent; apparently the earliest example is *R.* v. *Jacobi and Hiller* (1881), 46 L.T. 595 n. For other authorities see Beckett, *British Year Book of International Law*, 1925, p. 44, and 1927, p. 108.

With these precedents in mind, we turn to the law of pursuit.

The Common Law of Fresh Pursuit

Put in its most compact form the common-law rule (which will be referred to hereafter as "the common-law fiction") may be stated thus. Where an arrest or seizure is effected upon fresh pursuit, it is, in general, deemed to have been effected both at the time at which, and at the place from which, the pursuit began. Perhaps, once more, this is not so much a fiction as a Pickwickian meaning of the terms "arrest" and "seizure". But whether this is so or not, a moment's reflection will show, I think, that it has a bottom of good sense.

There are cases where the common law, of its wisdom, makes the exercise of certain rights or the imposition of certain duties dependent upon an arrest (or seizure) being effected at a certain time or place. Now suppose that a person (or animal) has rendered himself liable to be lawfully apprehended, and is on the point of being apprehended when he seeks release in flight. If he succeeds in getting away, there is nothing more to be said. No arrest has been effected and the culprit (or the owner of the culprit animal) is in as good a position as if no attempt at arrest had been made. If, on the other hand, he is "freshly pursued" (the term used in the common law) and apprehended at a distance, the position is different. There has been an arrest, even though the arrest, owing to the length of the chase, may have taken place outside the limits of time or space originally prescribed by law. In this case the general rule is that the culprit is not allowed to derive any legal advantage from his vain attempts at escape. He is in the same position as if he had been arrested at the beginning.

This rule was in full flower in the Middle Ages, and there is nothing to show that it has ceased to be a general principle of Anglo-American law. Several particular applications of it are still noted by modern writers, although the broad underlying principle is never explained.[1] For this reason a review of the chief medieval authorities may be of interest.

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[1] *The Twee Gebroeders* (1800), 3 C. Rob. 162; *The Araunah* (1888), Moore's *Digest*, Vol. II, p. 985, Moore's *Arbitrations*, Vol. I, pp. 824–5; Piggott, *Nationality* (1907), Part II, p. 40; Hughes in *American Journal of International Law*, Vol. XVIII (1924), pp. 232–3; Jessup, *Law of Territorial Waters* (1927), pp. 111–12, 242–58, 331; Masterson, *Jurisdiction in Marginal Seas* (1927), pp. 217–23, 365–71; Beck in *Canadian Bar Review*, Vol. IX (1931), pp. 261–4; Gidel, *Le Droit international public de la mer* (1934), Vol. III, pp. 306–7, 412–13. The doctrine was recognized in conjunction with hot pursuit in the draft Convention of the Hague Codification Conference, 1930, on the Legal Status of the Territorial Sea, Article 11 (2); cf. Gidel, *op. cit.*, pp. 354–5.

The history of the rule begins in the year 1293[2] with a case of distress damage feasant. The question at issue here needs a word of explanation. Distress damage feasant is the taking of trespassing animals by way of security for compensation, and the general rule has always been that they must be taken on the spot; there is no right to distrain a neighbour's cattle on a chance meeting for some trespass that they have committed in the remote past. Yet it was recognized, as early as this case of 1293, that if a man was about to distrain within the boundaries of his land, and the beasts were then driven out by their herdsman, the landowner had a right (as against the owner of the beasts) to follow them freshly and catch them wherever he could. The rule was shortly afterwards extended to beasts that ran away of their own accord. Although denied by some judges and lawyers of eminence it seems still to be recognized by the courts, subject to the qualification that the distrainor must actually have got into the *locus in quo* before the animals got out of it.[3]

The rule was applied to distress for rent in *Kirkman* v. *Lelly* (1314);[4] and it is with this case that its fictional basis attains prominence. By the Statute of Marlborough, 1267, the lord had been forbidden to distrain for rent "outside his fee". Since there was no express saving of the right of fresh pursuit, that right could be read into the words of the statute only by saying that a taking on fresh pursuit was, in the eye of the law, a taking on the land from which the pursuit started and not on the land where the actual capture was effected. Judging from the way in which issue was joined, this was the rule tacitly adopted in *Kirkman* v. *Lelly*. It received explicit statement in 1370: "The taking [on fresh pursuit] shall always refer to the first place."[5] Here, again, the right of fresh pursuit still survives, although it was subjected by Coke to certain restrictions, one being that the lord must have perceived the cattle within his fee before they were driven out.[1]

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[1] Nor has it been noticed by international lawyers. Some municipal analogues of hot pursuit are collected by Beck in *Canadian Bar Review*, Vol. IX (1931), p. 249, but his treatment of "fresh pursuit" is only fragmentary. He mentions the "fresh suit" of a thief that used to be necessary to avoid a forfeiture of stolen goods to the king; but this was simply a device for ensuring diligent prosecution. It has little to do with the rule discussed in this paper.

[2] Year Book 21 & 22 E. 1, Rolls Series 85.

[3] See my book on *Liability for Animals* (1939), Chapter IV, where the matter is discussed at large.

[4] Y.B. 8 E. 2, Selden Society (37) 87.

[5] Y.B. Trin. 44 E. 3. 20b, pl. 18, *per* Thorpe C.J.; cp. *Case of an Avowry*, 9 Co. at 22a, 77 E.R. at 763; 2 *Inst.* 131.

In 1454 the principle ramified into administrative law: where the officer of a court attaches a defendant by his horse to compel his appearance in court, and the defendant rescues the horse and flees, the officer may make fresh pursuit even into another county where he would normally have no jurisdiction.[2] The reason given is the same as before: the animal is adjudged to have been in the officer's possession from the start.[3] In the same way, where a justice of the peace sees a breach of the peace being committed and orally orders his servant to effect an arrest, the servant may pursue the offender and effect the arrest away from the magistrate's presence, although the magistrate could not have ordered the arrest had he not been present at the spot from which the chase started.[4]

Equally striking is the law relating to the offence of "escape". If an officer having charge of a felon negligently allows him to escape, this is an offence not only in the felon but also in the officer. But if the officer makes fresh pursuit and recaptures his man, then, so far as he is concerned, this is not an escape in the eye of the law at all.[5] It is the same where cattle that have been effectively distrained are rescued by their owner and are retaken by the distrainor on fresh pursuit; so far as the distrainor is concerned they are regarded as never having been out of his possession.[6]

Coming to more recent times, the root principle seems to have been applied to the construction of relatively modern statutes;[1] and the right of fresh pursuit has also been expressly recognized by statute as to the execution of warrants outside the jurisdiction of the issuing justice.[2]

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[1] Co. Lit. 161a, repeated in Halsbury, Vol. X, p. 486, and *Corpus Juris*, Vol. XXXVI, p. 553.

[2] Y.B. Mich. 33 H. 6. 52b, pl. 39.

[3] See Y.B. (1462), Pasch. 2 E. 4. 6b, pl. 15, where Littleton said, *arg.*: "If he [the officer] came to the plaintiff and said 'I arrest you', and he heard him, and afterwards for this reason fled into another county, it seems to me that he shall be adjudged to have been always in his arrest as well as if he had taken him in fact"—i.e. at the outset. The context shows that fresh pursuit is referred to.

[4] Y.B. (1498), Mich. 14 H. 7. 7b at 8b, pl. 19, *per* Serjeant Keble. It is not settled whether a constable or private person may without warrant arrest on fresh pursuit any one who in his presence commits a breach of the peace: see Y.B. (1473), Pasch. 13 E. 4. 8b, pl. 4; Halsbury, Vol. IX, pp. 86, 88 notes (*c*) and (*d*); *Corpus Juris*, Vol. V, pp. 406–7.

[5] See Y.BB. (1312–13), 6 E. 2 (unprinted: Bro. Escape 14, 49); (1314–15), 8 E. 2 (unprinted: Fitz. Corone 400); (1347/8), Hil. 22 E. 3 (unprinted: Fitz. Corone 236); (1495), Trin. 10 H. 7. 25b, pl. 3; 1 Hale *P.C.* 602; 2 Hawk. *P.C.* c. 19, s. 6: Halsbury, Vol. IX, p. 362; *State* v. *Wedin*, [1914] 85 N.J.L. 399, 89 Atl. 753; *Corpus Juris*, Vol. XXI, p. 827. Most of these authorities require that the felon should constantly have been kept in view; but cp. 2 Hawk. *P.C.* c. 19, s. 13.

[6] See my *Liability for Animals*, pp. 103–4, where authorities are assembled on the rule that the pursuit must be "fresh".

Such are the main authorities on the common law of fresh pursuit. It will be observed that their general age-level is high, and although some more recent cases might have been added, it remains true to say that in municipal law the subject has declined in importance. That is because it is a mere adjunct to the topics of self-help and of jurisdiction, which have themselves declined in importance. In international law they still loom very large, and so does the law of hot pursuit. When a coastguard cutter pursues a smuggler beyond territorial waters it raises exactly the same legal problem as when a medieval pinder pursued trespassing animals beyond his lord's domain, or as when a medieval officer of justice pursued a fleeing offender beyond his own county. Being the same problem, it will not be surprising if we find both legal systems tending to answer it in the same way.

Hot Pursuit in International Law

The international law of hot pursuit falls to be considered under two headings: pursuit into territory (this term including territorial sea) under the sovereignty of another state, and pursuit into the high sea.

(1) *Pursuit into territory under the sovereignty of another state.* This again admits of subdivision: the pursuit may take place either (*a*) in time of war into (i) neutral or (ii) enemy territory, or (*b*) in time of peace into any foreign territory.

(*a*) (i) The first writer to discuss the legality of pursuit into neutral territory seems to have been Bynkershoek.[3] After declaring the general illegality of attacking an enemy in a neutral territory or port, he goes on to ask the question whether hot pursuit into neutral waters is in the same position as an attack that originates in neutral waters. He comes to the conclusion that it is not. When an enemy has been found on the open sea he may, in the heat of battle, be pursued into neutral waters (other than a port[1]) and captured there. The same principle, Bynkershoek adds, applies to land engagements; it is lawful to pursue into neutral territory an enemy who is fleeing from a recent battle. "Uno verbo: territorium communis amici valet ad prohibendam vim, quae ibi inchoatur, non valet ad inhibendam, quae, extra territorium inchoata, dum fervet opus, in ipso territorio continuatur." There is an obvious resemblance between this and the common-law rule.

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[1] For instance, 7 & 8 Geo. IV, c. 30, s. 28, provides that "any Person found committing any Offence against this Act . . . may be immediately apprehended, without a Warrant, by" certain persons. In *Hanway* v. *Boultbee* (1830), 1 Mood. & Rob. 15, 174 E.R. 6, a person was seen committing an offence under the Act; a constable was immediately sent for, who followed him (he having left the place) and apprehended him at the distance of a mile. It was held that this was a lawful arrest within the Act. Cf. *R.* v. *Howarth* (1828), 1 Mood. C.C. 207, 168 E.R. 1243; Halsbury, Vol. IX, p. 95; but see also the cases cited *ibid.*, pp. 95–6, note (*m*).

[2] See, for England, Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 10, and Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 3, now superseded by Criminal Justice Act, 1925, s. 31 (3). See also, for the United States, *Corpus Juris*, Vol. V, pp. 422–3.

[3] *Quaestionum Juris Publici*, Lib. I, Cap. VIII. Halleck (*International Law*, 4th ed. (1908), Vol. II, pp. 168–9) refers to Casaregis, *De Commercio*, disc. xxiv, n. 11 (incorrectly

Bynkershoek's opinion was followed by Lee in his work on *Captures in War*,[2] for both sea and land engagements. Its validity, so far as concerned the sea, was first raised before Lord Stowell in *The Anna* (1805),[3] the case of the Mississippi mud islands. It was contended for the captors that even if the place of capture was within neutral (United States) territorial waters, yet as the chase had begun outside these waters no violation of neutral sovereignty was involved. The reason advanced was precisely the same as that given for the common-law rule: "The time of capture is to be dated from the time of pursuit." Lord Stowell dealt with the argument in these words.

> "But it is said that the act of capture is to be carried back to the commencement of the pursuit, and that if a contest begins before, it is lawful for a belligerent cruiser to follow, and to seize his prize within the territory of a neutral state. And the authority of Bynkershoek is cited on this point. True it is, that that great man does intimate an opinion of his own to that effect; but with many qualifications, and as an opinion, which he did not find to have been adopted by any other writers. I confess I should have been inclined to have gone along with him, to this extent, that if a cruiser, which had before acted in a manner entirely unexceptionable, and free from all violation of territory, had summoned a vessel

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cited as ii) and clxxiv, n. 11, as adhering to views similar to Bynkershoek's. But Casaregis has nothing on the specific question of hot pursuit; he is concerned exclusively with the general question of capture in neutral waters. At the first place cited he says that such a capture is good against the enemy, bad *vis-à-vis* the neutral; at the second place he states that it is entirely unlawful.

[1] He must not be pursued into a neutral port, because violence cannot be committed there without endangering friends. Moreover the land forts must not be attacked even though they begin to assist the enemy.

[2] 2nd ed. (1803), p. 123. The passage was quoted with apparent approval by Martin J. in a Canadian case, *The King* v. *The Ship "North"*, [1905] 11 B.C.R. 473, *A.J.I.L.*, Vol. II (1908), p. 695.

[3] 5 C. Rob. 373.

> to submit to examination and search, and that vessel had fled to such places as these, entirely uninhabited, and the cruiser had, without injury or annoyance to any person whatever, quietly taken possession of his prey, it would be stretching the point too hardly against the captor, to say that on this account only it should be held an illegal capture."

But he went on to hold that the captors in the case before him had not been of this model behaviour; they had stationed themselves in the mouth of a neutral river and used it as a base of operations. Hence a decree of restitution was pronounced.

Lord Stowell's qualified approval of Bynkershoek's rule is quoted without contradiction by Westlake,[1] although he adds that the judgment

> "stops far short of allowing a fight commenced outside territorial waters to be continued within them, which the danger thereby caused to neutral persons and property would render quite inadmissible."

Yet even on this narrow interpretation there can scarcely be any doubt that it does not now represent the law. Bynkershoek's rule is flatly rejected by Halleck[2] and Dupuis;[3] and Hall, too, seems to consider that it has been outgrown.[4] Moreover, there are prize-court decisions against it. In *The Adela* (1867)[5] the Supreme Court of the United States treated as important the place where a merchantman was actually captured, not the place where she was first required by the belligerent warship to lay to. In *The Pellworm* (1922)[6] some German vessels were sighted by British destroyers outside Dutch waters, and were signalled to stop, but had drifted into Dutch waters before possession was actually taken of them. The Privy Council, sustaining on this point the decision below, held that the capture constituted a violation of neutral territory.

Again, Bynkershoek conceded the same right of hot pursuit on land as he did on sea; no one would do so to-day.[7]

If these opinions are well based, the general principle to be collected from the law of neutrality is that a capture made in violation of the territorial sovereignty of a neutral state is not rendered lawful merely because it is the culmination of a pursuit that began in a place where capture would have been lawful.

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[1] *International Law*, 2nd ed. (1904–13), Vol. I, p. 173; Vol. II, p. 231.

[2] *International Law*, 4th ed. (1908), Vol. II, p. 169.

[3] *La Guerre maritime et les doctrines anglaises* (1899), p. 423.

[4] See his sketch of the development of neutrality: *International Law*, 8th ed. (1924), pp. 697–8, 721.

[5] 6 Wall. 266.

[6] [1920] P. 347; [1922] 1 A.C. 292.

[7] Halleck, *loc. cit.*; Rolin, *Le Droit moderne de la guerre* (1921), Vol. III, p. 192.

But an important question still remains. What is meant by "lawful" and "unlawful" in this context? Is a capture in neutral waters on hot pursuit unlawful against the neutral only, or is it unlawful also *vis-à-vis* the enemy?[1] Different countries answer this question differently. The practice of Great Britain, the United States, and some other countries is to treat *any* seizure of enemy property in neutral waters, whether on hot pursuit or not, as lawful so far as the enemy is concerned. It is only the neutral who can be heard to complain, not the enemy.[2] On the other hand, the view adopted by France and Germany is that the seizure is absolutely void. I can find no indication that these countries would be ready to make an exception to this principle, and conform to the Anglo-American view, in the specific case of hot pursuit.

(*a*) (ii) Pursuit into enemy territory rarely offers any problem, because hostilities may be conducted in any part of it. There is one case, however, where the question is important. This concerns the distinction between seizures in land warfare and seizures in naval warfare. As one example of the distinction, enemy private property is treated more leniently on land than at sea.[3] Suppose, then, that enemy sea-going property is carried inland to avoid seizure but is nevertheless captured after hot pursuit; is it to be regarded as property taken on land, or as property taken at sea? The answer given by the English courts in *The Anichab* (1919) was that the capture might then be regarded as a maritime one.[4] It seems to me that this ruling involves a straightforward acceptance of what I have called "the common-law fiction". The cardinal distinction between such a capture and capture in neutral territory is plain: there is here no unlawful violation of foreign sovereignty. The infraction of territorial sovereignty that does take place is justified by the laws of war. That being so, it is permissible to assign the taking on hot pursuit to the place from which pursuit starts.

(*b*) The same broad conclusion as was derived from the law of neutrality is equally deducible from authorities on the law of peace. Thus it is now generally agreed that the right of hot pursuit into the open sea, to which we are to come in the next section, ceases when the quarry enters the territorial waters of another state.[1] But again the same question has to be settled: does it cease *vis-à-vis* the littoral state only, or does it cease also against the state of registration of the offending ship? This question has not received specific treatment from the standard authors, or from the various conferences that have discussed territorial waters; but their very silence is significant. There can be little doubt that the right of pursuit ceases altogether. Thus Article 11, paragraph (3), of The Hague Conference, 1930, declares that the right *ceases* as soon as the pursued vessel enters the territorial sea of its own country or of a third state. Had the narrower view been adopted it would have been simple to express it—e.g. by saying that

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[1] The instinct of the common lawyer in parallel circumstances would be to adopt the first alternative. Thus it is as clear as anything can be in the absence of express decision that if cattle are distrained on fresh pursuit, the mere fact that the distrainor in so doing trespasses upon the land of a third party does not enlarge the rights of the owner of the cattle.

[2] See *The Adela* and *The Pellworm*, above, and other authorities collected in Oppenheim, *International Law*, 5th ed. (1935), Vol. II, p. 617, n. 5.

[3] For other differences see Hudson in *A.J.I.L.*, Vol. XVI (1922), p. 375.

[4] [1919] P. 329, affd. [1922] 1 A.C. 235. But on the actual facts the property was restored because there had been no hot pursuit. The case is discussed by Beck in *Canadian Bar Review*, Vol. IX, pp. 349–52.

> "if the pursued vessel enters the territorial sea of its own country or of a third state, and is captured there, nothing in this article shall affect the right of such state to complain of a violation of its territorial sovereignty".[2]

So also with pursuit of a criminal over a land frontier. There is no doubt that so far as the neighbouring state is concerned this step can be justified, if at all, only by necessity.[3] What if the criminal is a national of a third state? On the analogy of the last paragraph, it would be consistent to hold that this state has exactly the same right of complaint as the state whose territory has been trespassed upon.

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[1] See Gidel, *op. cit.*, pp. 356–8. Beck, *op. cit.*, pp. 198–9, goes further, and suggests that the littoral state may protest against a continuation of the pursuit into its contiguous zone, provided that the claim to the zone is recognized by the state of the flag of the pursued ship; *sed quaere*.

[2] Consider also the language used by Gidel, *op. cit.*, p. 356. The learned author says that an end may be put to the pursuit either by *raisons matérielles* or by *raisons juridiques*. *Raisons matérielles* include, for example, escaping in a fog. *Raisons juridiques* comprise an escape into the waters of a state other than that of the pursuer. His opinion is clearly that the second event puts an end to jurisdiction over the vessel as much as the first does. Yet Beck, *op. cit.*, pp. 196–7, applies the Anglo-American doctrine in prize. "The littoral State . . . can object, though neither the owners of the ship nor the flag state can do so."

[3] G. F. de Martens, *Précis du droit des gens* (1831), Vol. I, sec. 103; Woolsey, *International Law*, 6th ed. (1901), sec. 56. The dispute concerning *The Caroline* (1838) very nearly illustrates the proposition, although it was not exactly a case of hot pursuit. See also the negotiations between the United States and Mexico leading up to the agreement of 1882, whereby the armed forces of each country were permitted to cross the border in pursuit of hostile Indians: Hershey in *A.J.I.L.*, Vol. XIII (1919), p. 557. But Beck, *op. cit.*, pp. 363–5, suggests that there may be developed a right of hot pursuit in the air.

Our results up to this point may be summarized briefly. There are some indications that international law is prepared to recognize a principle similar to the common-law fiction. But the principle, if it exists, is at the present day subject to a large exception. Owing to the sanctity attached to territorial sovereignty, it cannot apply where the arrest or capture is effected within the territory (or territorial waters) of another friendly state.

(2) *Pursuit into the high sea.* In one application, at least, the right of hot pursuit into the high sea now commands general agreement. This is where a foreign private vessel has infringed the law of a state within its territorial or national waters.[1] In a sense the right of pursuit here is a general one, for it is immaterial whether the particular law infringed relates to fisheries, customs, shipping, neutrality, or anything else.[2] But the violation must have occurred within territorial waters or else agreement ends. The most that can be said is that the trend of opinion is towards an enlargement of the right.

Most writers seek no theoretical justification for the rule except the necessity of having it if justice is to be effectively administered;[3] it has not yet been cast in the same doctrinal form

[1] The acceptance of the right of pursuit seems to owe a great deal to the practice of Great Britain and the United States: see Rivier, *Principes* (1896), Vol. I, p. 151; *Hudson* v. *Guestier* (1810), 6 Cranch 281; Sir Charles Russell in *Fur Seal Arbitration Proceedings* (1893), Vol. XIII, p. 300. But it does not follow that there has been any borrowing from the common law of fresh pursuit; the rule is so natural that it was probably worked out spontaneously.

It is no part of the purpose of this article to examine all the authorities on hot pursuit into the high sea. There is an exhaustive discussion in Gidel, *Le Droit international public de la mer* (1934), Vol. III, pp. 339 and 490; Beck in *Canadian Bar Review*, Vol. IX (1931), pp. 85, 176, 249, 341; Massin, *La Poursuite en droit maritime* (1937). Some of the older authorities against the rule are gathered together by Hershey in *A.J.I.L.*, Vol. XIII (1919), pp. 567–8. The hardening of opinion in favour of it may be due in part, as Beck suggests (p. 361), to the increased speed of modern vessels.

[2] See Beck, *op. cit.*, pp. 180–5; *per* Idington J. in *The Ship* "*North*" v. *The King*, [1906] 37 Can. S.C.R. 385 at 403.

[3] e.g. Westlake, *International Law* (1904), Vol. I, p. 173; Hyde, *International Law* (1922), Vol. I, p. 420; Dickinson in *Harvard Law Review*, Vol. XL (1926), p. 21 ("territorial security"); Beck, *op. cit.*, pp. 199–200, and authorities there cited. Hall, *International Law*, 8th ed. (1924), p. 309, cuts a little deeper: it is "a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape would have been begun, within the territory itself". In *The Ship* "*North*" v. *The King*, [1906] 37 Can. S.C.R. 385, Davies J. (at p. 394) approved Hall's statement, and Idington J. (at p. 400) suggested the principle to be that "the seizure is not to be frustrated by the wrong-doer's attempt to escape". (In this case the right of hot pursuit from territorial waters was read into a Canadian statute that did not mention it; but no use was made of the common-law fiction.) Another suggestion was half-heartedly advanced by Piggott: where an offence has been committed for which the penalty is confiscation,

as the common-law rule. That is partly why there is no agreement upon its exact limits. All that is known is that the practice of nations concedes a right of hot pursuit from territorial waters into the high sea. The question is how the rule deducible from this is to be stated. Is it simply that there is a right of hot pursuit from territorial waters? Or is it that a vessel captured on the high sea after hot pursuit is deemed as a matter of legal theory to have been captured at the place from which the chase started? For if the latter, it is a principle applicable equally to the pursuit of a vessel suspected of "hovering" outside territorial waters, or to the interpretation of a treaty.

The question has very nearly arisen over the exegesis of the Anglo-American Liquor Treaty of 1924, although the United States has not yet been adventurous enough to put its case squarely upon the common-law fiction. It will be recalled that Article II of the treaty gives the United States certain rights of boarding, searching, and seizing private vessels under the British flag, provided that

> "the rights conferred by this article shall not be exercised at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavouring to commit the offence", &c.[1]

On more than one occasion the American Federal Courts have held that a right of hot pursuit from this extended zone may be read into the treaty. But the reasons advanced in support of the interpretation have been somewhat perfunctory. In *The Vinces* (1927) a District Court suggested two. The first was "necessity", which received no further analysis. The second was the principle that

> "when [a British] vessel comes within an hour's sailing distance, and the officers of the United States have probable cause, as prescribed by the treaty, then it is the duty of the British vessel, when properly hailed, to stop and submit to examination. If she does not so stop, the United States has the right to compel her to stop, and in pursuance of this undoubted right may pursue her and enforce it, even though the offending vessel escape beyond one hour's sailing distance of the coast."[2]

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the littoral state has a quasi-property right in the vessel (*Nationality* (1907), Vol. II, p. 36). Yet, as he went on to admit, the right of hot pursuit is not confined to this type of case.

[1] The repeal of the Eighteenth Amendment has not abrogated this treaty; see Dickinson in *A.J.I.L.*, Vol. XXVIII (1934), pp. 101–4.

[2] 20 Fed. (2d) 164 at 174–5 (District Court, South Carolina). The rule was applied equally to the 12-mile limit established by U.S. legislation.

On appeal the question received more summary treatment.

> "We take it as clear, under the 'hot pursuit' doctrine, that if the right of seizure existed at the time the vessel was signalled, the right was not lost because she had succeeded in getting farther away from shore in her attempt to run away."[1]

This is an accurate enough statement of the customary law of hot pursuit, but not an explanation of why it applied to the words of the treaty. Moreover, difficulty is caused by *The Newton Bay* (1928), where the decision in *The Vinces* was followed even though no signal to stop had been given within the limit.[2] It was enough that the inference was fairly deducible that the crew of the law-breaking vessel knew of the pursuit and its object. This seems to knock the bottom from the second of the reasons given by the court below in *The Vinces*.

Despite this extension, the argument presented by the United States in the *I'm Alone* arbitration (1933–5)[3] went back to and elaborated the reasoning in *The Vinces*. It was contended, first of all, that the question rested not so much upon the "abstract doctrine of hot pursuit" as upon "the terms of the specific contract (whether expressly stated or necessarily implied)". Then it was urged that as a matter of interpretation the "rights conferred" by the article are "exercised" at the time when the notice to heave-to is given. Perhaps the key sentence of the argument is this:

> "The right to board, when invoked by signal within the treaty limit, is a right which cannot be defeated by flight: when boarding is achieved, no matter where, it is a mere consummation of the right which was exercised when the hailing took place."[4]

This proposition may be assailed on two grounds.

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[1] *Gillam* v. *U.S.*, [1928] 27 Fed. (2d) 296 at 299 (Circuit Court of Appeals, 4th Circuit). Certiori denied 278 U.S. 635. The case is digested in *Annual Digest, 1927–8*, Case No. 128.

[2] 30 Fed. (2d) 444 (District Court, New York); affd. (1929) 36 Fed. (2d) 729 (Circuit Court of Appeals, 2nd Circuit), *Annual Digest, 1927–8*, Case No. 129. "The limit" here was the 12-mile limit rather than the treaty limit, but it does not seem to have been intended to draw any distinction between them. The view now taken is that the treaty restricts the 12-mile zone Act: *Cook* v. *U.S.*, [1933] 288 U.S. 102, 53 S. Ct. 305 (Circuit Court of Appeals, 1st Circuit).

To the same effect as *The Newton Bay* are *The Pescawha*, [1928] 45 Fed. (2d) 221 (District Court, Oregon), *Annual Digest, 1929–30*, Case No. 86; *The Resolution*, [1929] 30 Fed. (2d) 534 (District Court, Louisiana), *Annual Digest, 1929–30*, Case No. 87 (where a signal to stop was given within the limit but no evidence was adduced that it had been seen or heard); *The Which One*, [1933] 2 F. Supp. 890 (District Court, New York); *The Miss C.B.*, [1933] 63 Fed. (2d) 639 (Circuit Court of Appeals, 5th Circuit).

[3] Publications of the Dept. of State, Arbitration Series No. 2 (1)–(7) (Washington, 1931–5).

[4] *Answering Brief of the United States*, pp. 18–19.

First, even on the view of the United States, it is not every boarding that can be regarded as a consummation of the right to board, but only a boarding after pursuit. Suppose that after a signal to stop has been given and disobeyed the offender is not pursued; she could not be boarded if at a later time she were to be met casually on the high seas. If the contention of the United States is rested upon the actual words of the treaty, what words are there in the treaty to indicate or imply this distinction?

Second, the sentence just quoted from the United States brief seems to contain a jurisprudential flaw. "When boarding is achieved, no matter where, it is a mere consummation of the right which was exercised when the hailing took place." What, may one inquire, is the consummation of a right if it be not the exercise of it? I suggest that the true analysis of the situation is this. The so-called right to require the offending vessel to stop is in strict language a power. When the power is exercised by a signal being given, the offending vessel comes under a duty to stop, and the police vessel has a liberty (or, in Hohfeld's term, a privilege) to use reasonable means to compel her to stop.[1] When the liberty is exercised by bringing the vessel to a stop, this may in a sense be regarded as a "consummation" of the power to require her to stop, but the power and the liberty are nevertheless different legal concepts, which may well be exercised in different parts of the sea. Both the power and the liberty are "rights" conferred by the treaty, the word "rights" being used here in a generic sense. Yet according to the wording of the article *all* the "rights" conferred by it are to be exercised within the treaty limit.

In short, it is worth consideration whether the learned legal advisers of the United States did well to abandon in their argument the "abstract doctrine" of hot pursuit. If expressed in the form of a fiction as to the place of taking, might it not have buttressed their reading of the treaty more effectively than the reasoning just examined?

Exigencies of space forbid discussion of the detailed problems that arise concerning the right of hot pursuit, but a simple enumeration of the more important of them, with a few footnotes, may be made. There is the question whether the offence committed need be one involving the ship herself;[1] whether a pursuit and arrest may take place on simple suspicion of an offence;[2] whether (where the pursuit is from national or territorial waters) the captor must himself have been within these waters at the outset of the chase;[3] whether pursuit must have begun while the offending vessel was still within these waters;[4] what is meant by "beginning" the pursuit;[5] whether the fugitive must have been kept in view throughout the chase;[6] whether the chase must have been kept up by the same vessel, or whether it may be taken up in relays;[7] whether, finally, the chase must *cease* when the fugitive vessel enters the national or territorial waters of its own or of a third state, or whether in such circumstances the pursuit is only suspended.[8] Several of these questions are very similar to those ventilated in the English courts concerning fresh pursuit, although neither in the one case nor in the other are the answers always uniform.

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[1] For the sake of simplicity I have refrained in the text from discussing the question whether the power and the liberty exist in international law or in United States municipal law. My own view is that they exist in both—against Great Britain and the Dominions in international law, and against the vessel in United States municipal law. The vessel's duty to stop exists only in United States law. As Mr. Fitzmaurice points out (*British Year Book of International Law*, 1936, pp. 96–7), it is difficult to concur in the argument of the United States that the convention is "binding" in British municipal law.

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[1] See Piggott, *Nationality* (1907), Vol. II, pp. 36, 38–9.

[2] There are two questions here. (1) May a chase take place on a slender suspicion, if that suspicion turns out to have been justified? No, according to Piggott, *op. cit.*, p. 37; *sed quaere*. Story J. said in *The Marianna Flora* (1826), 11 Wheat. 1 at 42, 6L. Ed. 405 at 415: "The party, in such case, seizes at his peril. *If he establishes the forfeiture, he is justified.* If he fails, he must make full compensation in damages" (italics mine). (2) May a chase take place on a reasonably well-grounded suspicion, if that suspicion turns out to be unjustified? No, according to the statement just quoted; cf. Gidel, *op. cit.*, pp. 351–2. But, as Professor Gidel adds, a refusal to stop may itself be a breach of the local law, which may thus justify pursuit. This qualification robs the question of much of its practical importance.

[3] No: see Gidel, *op. cit.*, p. 353.

[4] No, according to Hall, provided that the fugitive has only just escaped from territorial waters: *International Law*, 8th ed. (1937), p. 309. So also Taylor, *International Public Law* (1901), p. 310; Oppenheim, *International Law*, 5th ed. (1935), Vol. II, p. 482. But the weight of opinion is against them; cf. Beck, *op. cit.*, p. 185, notes 39–40; Gidel, *op. cit.*, pp. 352–5; Art. 11 of The Hague Conference (1930). Note that the authorities collected by Beck are concerned only with the conditions attaching to the right of hot pursuit from territorial waters; they are not conclusive against a right of pursuit from the contiguous zone.

[5] It would seem at first blush that pursuit begins when the police vessel starts to make for the delinquent with a view to apprehending her. But there are two unsettled questions. First, is it essential for the valid commencement of a pursuit that the police vessel should perceive the offender, or can it conduct the pursuit on wireless information? Second, is it essential that the offender should be given a clear signal to stop, or is it enough to show that she is consciously fleeing from justice? The Final Act of The Hague Conference of 1930 answered both questions by requiring a visible or audible signal to stop, but we have already seen that the courts of the United States do not insist upon this. It seems clear, at least, that no signal to stop can be required if the vessel has already been arrested but is endeavouring to slip away.

[6] If the fugitive eludes observation for a time this will be a piece of evidence relevant to infer that the pursuit was not hot; but probably it will not be conclusive. Cf. Gidel, *op. cit.*, p. 356.

[7] This was one of the questions left undecided in the *I'm Alone*.

[8] The Conference at the Hague, 1930, voted for *cessation* (Art. 11 (1)). Cf. Gidel, *op. cit.*, pp. 356–8.

Conclusions

(1) *Common law.* It is a general principle of the common law that where an arrest or seizure is effected upon fresh pursuit, it is, in general, deemed to have been effected both at the time at which, and at the place from which, the pursuit began.

(2) *International law.* The stage may be regarded as being set for a similar generalization in international law. Perhaps the rule may be stated thus. "Where the police or armed forces of a state have the right to effect an arrest or capture at one place, and actually effect it, after hot pursuit, at another place, the arrest or capture is deemed to have been effected at the first place."

If this principle is valid it may properly be used as a guide to the construction of treaties.

At the present day, whatever may have been the case in former times, the principle can apply only where the arrest or capture is effected on the open sea or in enemy territory. It does not apply where the arrest or capture is effected within the territory of another friendly state.

SOME INTERNATIONAL LAW ASPECTS OF THE REFUGEE QUESTION

By R. YEWDALL JENNINGS

THE refugee problem which has recently grown to such vast proportions is a many-sided one: it raises political, economic, social, and ethical, as well as legal issues. Moreover, in its strictly legal aspect it touches not only international but also municipal law. It is the purpose of this article to attempt only an indication of those issues which are of immediate concern to the international lawyer.

Conventional law

During the last two decades there have been concluded a number of treaties designed to confer upon the individual refugee a distinct legal status in order that he may lead a normal legal life. The status of the refugee is not, of course, a permanent one. The aim is that he should rid himself of that status as soon as possible, either by repatriation or by naturalization in the country of refuge. But the first is not usually possible and the second, where attainable, is usually long delayed. In the meantime "it seems essential that such identity papers and passports should be issued as may secure a certain minimum of 'personality', stability, freedom of movement and freedom to return, if desired, to the point whence he came".[1] The treaties about to be examined are designed to this end, assimilating the position of the refugee, as far as possible, to that of the ordinary national enjoying the protection of his government. That such treaties are in existence does not, of course, signify that the ideal of a distinct legal status for refugees has been attained, for not only are the treaties of limited application, but also accessions have not been so plentiful as might be desired, whilst those states which have acceded to, or signed, the conventions have made extensive reservations, sometimes in respect of essential articles.[2]

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[1] *Report of League Committee on International Assistance to Refugees*, C.2, M.2, 1936, XII.

[2] Though it should also be noted that some states have applied the provisions of the treaties in practice, though unwilling to assume a binding obligation to do so. Thus, the 1933 convention has been applied by the following non-signatory states: Estonia, Finland, Greece, Iraq, Latvia, Sweden, Switzerland, the United States, and Yugoslavia. See also League document A.17, 1937, XII.

Scope of the Arrangements[1] *and Conventions.* If a legal régime is to be established governing the status of refugees, the first step must be a definition of the term "refugee". The normal individual is a national of some state enjoying the protection of the government of that state. There are also stateless persons who are not legally entitled to claim the protection of any state. A refugee may, or may not, be a stateless person. Quite often he remains a national of the state from which he has had to flee. The peculiarity of the refugee is that he does not *in fact* enjoy the protection of the government of his state of origin, whether he is legally entitled to such protection or not. He is the victim of a pathological state of society in which the government which would normally form the link between him and international law not only fails to perform that function, but goes out of its way to embarrass him, so that he is actually in need of protection against it. It is this lack of protection, in fact, which is the test of a refugee adopted in all the arrangements and conventions.[2] But there are no treaties which purport to deal with all refugees. Each is limited in its operation to refugees coming from certain specified states of origin. Refugees whose status is thus regulated belong to one of two classes.

In the first group are the so-called "Nansen refugees", assistance for whom was first organized by Dr. Nansen acting as League High Commissioner, and later by the office which bears his name. The principal treaty[3] concerning Nansen refugees is

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[1] The so-called "Arrangements" are anomalous instruments. Although in treaty form, they do not contain categorical stipulations, but merely "recommend" that a certain course of conduct be followed.

For history of arrangements and conventions, see Holborn, *American Journal of International Law*, 1938, p. 680.

[2] See also the discussion of the definition of a refugee in the *Annuaire* of the Institute of International Law, 1929.

[3] Treaties applicable to Nansen refugees are the following:

Arrangement of July 5, 1922. (51 accessions.)
Arrangement of May 31, 1924. (35 accessions.)
Arrangement of May 12, 1926. (23 accessions.)
Arrangement of June 30, 1928, concerning the legal status of Russian and Armenian Refugees. (14 accessions.)
Arrangement of June 30, 1928, concerning the Extension to other categories of Refugees, &c. (13 accessions.)
Arrangement of June 30, 1928, concerning the Functions of Representatives of the League High Commissioner for Refugees. (2 accessions.)
Accord between France and Belgium, June 30, 1928.
Convention concerning the International Status of Refugees, Oct. 28, 1933. (5 signatures; 4 ratifications; 4 later accessions.)

[*Note continued on next page.*]

now the Convention of October 28, 1933, which is stated in Article 1 to be applicable to refugees as defined in the Arrangements of May 12, 1926, and June 30, 1928, "subject to such modifications and amplifications as each Contracting Party may introduce in this definition at the moment of signature or accession".[1] The Arrangement of 1926[2] applies to any person of Russian origin, or any person of Armenian origin formerly a subject of the Ottoman Empire, who does not enjoy, or who no longer enjoys, the protection of the government of the Union of Soviet Socialist Republics or of the Turkish Republic respectively, and who has not acquired another nationality. To these the Arrangement of 1928[3] adds persons in a similar position, but of Assyrian, Assyro-Chaldean, Syrian, or Kurdish origin, and also persons of Turkish origin previously subjects of the Ottoman Empire who, under the terms of the Protocol of Lausanne, do not enjoy the protection of the Turkish Republic. To this first group of refugees must now also be added those who "having previously had the status of inhabitants of the Saar, have left the territory on the occasion of the plebiscite and are not in possession of national passports".[4]

The second group consists of the German refugees, assistance for whom was, until January 1, 1939, organized by the High Commissioner for Refugees coming from Germany. These refugees are defined as follows by the Convention of February 10, 1938, which for most states replaces[5] the provisional Arrangement of July 4, 1936:

"(*a*) Persons possessing or having possessed German nationality, and not

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[*Note continued from previous page.*]

Arrangement relative to Saar Territory Refugees, July 30, 1935. (17 accessions.)

Article 16 of the 1933 convention provides that:

> "The Arrangements and Agreements of July 5, 1922, May 31, 1924, May 12, 1926, and June 30, 1928, shall, in so far as they have been adopted by the contracting parties, remain in force as regards such of their provisions as are compatible with the present convention."

[1] Article 1.

[2] *League of Nations Treaty Series*, 89, p. 47.

[3] *Ibid.*, p. 63.

[4] Arrangement concerning Saar Territory Refugees, July 30, 1935; League document C.L. 120, 1935, XII.

[5] Article 18 of the 1938 convention provides that:

"The present convention replaces the provisional Arrangement of July 4, 1936, as between all parties to the present convention. It does not affect the operation of that Arrangement as regards parties who are not parties to the present convention."

The provisional Arrangement (text in Cmd. 5338) applied to "any person who was settled in that country (Germany), who does not possess any nationality other than German nationality, and in respect of whom it is established that in law or in fact he or she does not enjoy the protection of the Government of the Reich".

> possessing any other nationality, who are proved not to enjoy, in law or in fact, the protection of the German Government;
>
> "(*b*) Stateless persons not covered by previous conventions or agreements who have left German territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the German Government.[1]
>
> "Persons who leave Germany for reasons of purely personal convenience are not included in this definition."

The German refugees now include also refugees coming from the territory which was formerly Austria. The competence of the High Commissioner for Refugees coming from Germany was extended to cover Austrian refugees by a resolution of the Council of the League of May 1938.[2]

Identity and travel documents. The primary requirement for refugees was the provision of an identity and travel document analogous to a national passport. On this point it has always been comparatively easy to obtain the consent of states, for it is in the interest of all parties to facilitate freedom of movement. The Arrangement of 1922 provided for the issuing of such a document to Russian refugees, under certain conditions. Thus, it was not to infringe the laws and regulations in force in any state with regard to the control of foreigners. The issuing state alone was to be qualified to renew it, so long as the refugee continued to reside within the territory of that state. On presentation of the identity certificate the refugee might be admitted to a state he wished to enter if the government of the state of destination affixed its visa directly on to the certificate, and if that state regarded it as a document containing proof of identity, the production of which would enable its consular authorities to issue a new certificate to the bearer enabling him to cross the frontier. The text of the certificate was to be in two languages, the language of the issuing state and the French language. The operation of these certificates was extended to the other categories of Nansen refugees by the later Arrangements, that of 1926[3] adding certain improvements; in particular it was recommended that children under fifteen years of age should be included in the certificate of their parents.

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[1] To this article the United Kingdom added the rather important reservation that it should be "applicable only to refugees coming from Germany as defined, who at the date of ratification no longer enjoy the protection of the German Government".

[2] See *O.J.*, May–June 1938, p. 367. Steps are being taken to extend the terms of the 1938 convention to cover refugees from the former territory of Austria. On June 9, 1938, the Secretary-General of the League submitted to the governments concerned a draft protocol, and on Sept. 2 there was circulated a rather more elaborate protocol drafted by the Government of the United Kingdom. The texts of these drafts are in League documents C.L. 99, 1938, XII, Annex 2, and C.L. 154, 1938, XII, Annex, respectively.

[3] *League of Nations Treaty Series*, 89, p. 47.

Mention must also be made of an Arrangement of 1928[1] which provided for the exercise of certain quasi-consular functions by representatives of the High Commissioner for Refugees, including the following services:

> "(*a*) certifying the identity and the position of refugees;
> "(*b*) certifying their family position and civil status, in so far as they are based on documents issued or action taken in the refugees' country of origin;
> "(*c*) testifying to the regularity, validity, and conformity with the previous law of their country of origin of documents issued in such country;
> "(*d*) certifying the signature of refugees and copies and translations of documents drawn up in their own language."

The travel and identity documents issued in accordance with these arrangements became known as Nansen certificates or passports. Article 2 of the 1933 convention made obligatory the issue of such certificates, valid for not less than one year, to refugees residing regularly within the territory of the High Contracting Parties.

But, of course, the Nansen certificate applies only to Nansen refugees. When Mr. James G. McDonald was appointed High Commissioner for Refugees coming from Germany, he did not find it necessary to introduce a special identity document, for most of the German refugees at that time were in possession of a national passport. But when Sir Neill Malcolm succeeded to the task as League Commissioner in 1936 he found it necessary to provide such a document. This was accomplished first by means of the provisional arrangement of that year, and finally by the convention of 1938. By that convention the parties undertake to issue to refugees coming from Germany, and sojourning lawfully within their territory, a travel document similar to an attached specimen. Furthermore, they undertake, as a transitory measure, to issue such documents to refugees not staying lawfully in such territory at the date of the coming into force of the convention, provided those refugees report themselves to the authorities within the period prescribed by the government of the High Contracting Party concerned. The documents are to be in conformity with the laws and regulations governing the supervision of foreigners in force in the territory in question. As a general rule they are to be valid for a period of one year from the date of issue, and renewal is made a matter for the issuing authority. If, however, the refugee takes up residence in another territory to which the convention applies, the authorities of that territory are required to supply him with a new travel document. Children under sixteen years of age are to be entered upon the certificate issued to their parents. It is to be made out in French and in the language of the issuing authority. In addition, the signatories undertake to grant facilities for the issue of transit visas to refugees who have obtained visas for the territory of final destination.

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[1] *League of Nations Treaty Series*, 89, p. 53. See also the Franco-Belgian Accord of July 30, 1928.

It will be noticed that there is no travel document of general application, and that there is none whatever for refugees who do not come within one of the two categories of Nansen refugees and refugees coming from Germany, and who do not possess a national passport. The Third Conference on Communications and Transit (1927) recommended the adoption of a uniform type of document of general application in the case of persons "without nationality or of doubtful nationality".[1] But these recommendations came to very little in practice, and, indeed, they created not a little uneasiness amongst refugees. The Central Committee of the Refugee Organizations wrote to Dr. Nansen in February 1927, asking him to oppose any proposal for the adoption of a general stateless document in place of the Nansen certificate, which latter they regarded as "a sign of the legal recognition of their peculiar status".[2]

The right to return. Clearly, much of the value of the travel document is lost if it does not imply a right to return to the territory of the state which issues it, for then the refugee will find the gravest difficulty in obtaining visas enabling him to proceed to another state, even for a limited period. In the Arrangement of 1922 it was expressly stated that the issue of an identity certificate to Russian refugees should not in any way imply the right for the refugee to return to the state in which he obtained it unless he had the special authorization of that state. However, in the Arrangement of 1924 it was urged that states should grant such authorization in all cases where there were no special reasons to the contrary, and to this same end the Arrangement of 1928 recommended the adoption of a formula enabling return.[1] The right to return was finally made a regular feature of Nansen certificates by the convention of 1933, which required that the text of the certificate should include some formula authorizing exit and return. Moreover, bearers of valid Nansen certificates were to be allowed to return without the requirement of authorization on exit, or of a visa on return.

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[1] See *O.J.*, 1927, p. 1608. The form of document recommended was similar to that suggested by the Passport Conference of 1926; see League document C. 320, M. 119, 1926, VIII.

[2] A. 48, 1927, VIII, 9.

In regard to German refugees the 1938 convention provides that the travel document shall entitle the holder to return during the period of the validity of the document, but reserves to the High Contracting Parties the right, in exceptional cases, to limit the period during which the refugee may return, such limitation being noted on the document.[2]

Cost of travel and identity documents. As early as the Arrangement of 1922 it was recommended that the identity certificates should be issued free of charge to destitute persons. The 1926 Arrangement extended this provision to entrance, exit, and transit visas. In 1926, also, was introduced the Nansen stamp system by means of which a revolving fund was created, financed by the income from the sale of stamps to be affixed to the identity certificate or card or to the *permis de séjour*. The cost of the stamp was five gold francs, and this in addition to any charge which might be made according to the municipal law for the issue of the document. It was recommended that the stamp fee be charged "at the discretion of the states . . . in order to ensure that the fee shall be paid by all Russian and Armenian refugees, except those who are without means". Steps were, however, to be taken to obviate the payment of the fee more than once a year by any refugee. The 1933 convention provided that the cost of visas for Nansen certificates should be according to the lowest tariff applied to the visas for foreign passports, subject to their free issue to indigent refugees.[2]

In regard to the travel documents issued to German refugees no attempt has been made to introduce a stamp system. It is merely provided in the 1938 convention that the travel documents shall be issued at a cost not exceeding the lowest scale of charges made for national passports, and that they shall be issued entirely free of charge to indigent refugees.[3] Similarly, the cost of entrance and transit visas is not to exceed the lowest scale of charges for visas on foreign passports, and no charge whatever is to be made to indigent persons.[1]

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[1] Article 9: "This certificate is valid for the return journey to the country by which it was delivered during the period of its validity. It shall cease to be so valid if at any time the bearer enters the territory of the Union of Socialist Soviet Republics (in the case of Russian refugees) or of Turkey (in the case of Armenian refugees)."

[2] Article 2 (4).

[3] Article 3 (2) (*g*).

Expulsion. Great hardship has been caused to refugees by the arbitrary exercise by states of their undoubted powers of expulsion, "*refoulement*", and "reconduction".[2] An attempt to alleviate the position was made in the 1933 convention, when the parties undertook not to exercise the power of expulsion or "*refoulement*" in respect of refugees who have been authorized to reside in their territory regularly "unless the said measures are dictated by reasons of national security or public order".[3] They also undertook "in any case not to refuse entry to refugees at the frontiers of their countries of origin".[4] But the gravest difficulties arise where a refugee who is subjected to an expulsion order cannot obtain the necessary visas to enable him to enter another state. He may thus incur penalties for failing to comply with an expulsion order which it is materially impossible for him to carry out. Clandestine and illegal crossing of frontiers has been encouraged and even ordered by expelling states. To these unfortunate people the signatories of the 1933 convention reserve the right to apply such "internal measures as they may deem necessary".

As regards the expulsion of refugees coming from Germany, the convention of 1938 substantially repeats the provision of the 1933 convention to the effect that refugees authorized to reside within a territory may not be subjected to expulsion orders "unless such measures are dictated by reasons of national security or public order".[5] In addition, the contracting parties undertake to grant to every refugee who is subjected to an expulsion order a suitable period in which to make the necessary arrangements.[6] Furthermore, refugees are not in any case to be reconducted to German territory unless they have refused, without just cause, to make, or to avail themselves of, arrangements to proceed to another country. In this latter case the travel document is subject to withdrawal or cancellation.[1]

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[1] Article 4 (4).

[2] Recommendations on this subject were made at the 13th, 14th, and 15th Assemblies of the League. See also the Report of the Inter-governmental Advisory Commission of May 20, 1935, in League document C. 137, M. 71, 1935, XII.

[3] Article 3 (1). The United Kingdom made a reservation to the effect that this provision should not be applicable to refugees admitted to the United Kingdom for a temporary visit or purpose, and that "public order" should be deemed to include matters relating to crime and morals.

[4] Article 3 (2); not accepted by the United Kingdom.

[5] Article 5 (2); the United Kingdom made a reservation similar to the one annexed to the corresponding article of the 1933 convention.

[6] Article 5 (1); the United Kingdom excluded refugees subject to extradition proceedings begun in the United Kingdom from the operation of this paragraph.

There is one possible restriction on the power of expulsion which has not yet appeared in any convention but which was strongly urged by Judge Hansson in his report to the 1936 League Committee on International Assistance to Refugees,[2] and that is that refugees should be given a hearing before an expulsion order is made against them. It quite often happens that a refugee is expelled without his having any knowledge of the reason of the expulsion, and without having any opportunity to defend himself against what may be erroneous or slanderous charges.

Travel within country of residence. It is in the interest of all parties that a refugee should be able to improve his economic status. To this end it is desirable not only that he should be able within reasonable limits to travel from state to state, but that he should also be able to move freely within his country of residence. Article 2 of the 1938 convention was the first attempt to stipulate for such a right of residence and free movement within territory to which the convention applies. It is expressed, however, as being "without prejudice to the power of any High Contracting Party to regulate the right of sojourn and residence".

Legal status. The conventions of 1933 and 1938 have conferred upon refugees the rudiments of a personal legal status.[3] The 1933 convention provides that the personal status of refugees is to be governed by the law of their country of domicil, or, failing such, by the law of their country of residence.[4] The 1938 convention has a similar provision with the addition that where they have retained a nationality their personal status shall be governed by the "rules applicable in the country concerned to foreigners possessing a nationality".[5] Both conventions provide for the respecting of "acquired rights" under the former national law of the refugee, and in particular rights pertaining to marriage.[6] A further important stipulation which appears in both conventions in identical form is that "refugees shall have, in the territories of the contracting parties, free and ready access to the courts of law". In the countries of their "domicil or regular residence" they are to enjoy in this respect the same rights and privileges as nationals.[1]

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[1] Article 5 (3). The Netherlands was unable to accept this section.

[2] C. 2, M. 2, 1936, XII, Annex.

[3] See also Arrangement of June 30, 1928.

[4] Article 4 (1).

[5] Article 6.

[6] Article 4 (3) of 1933; Article 7 of 1938.

Labour conditions, welfare, and relief. One of the major problems of the settlement of refugee populations has arisen from the fact that even when refugees are allowed to remain in a country they find themselves subject to discrimination in matters of employment. An attempt to remedy this situation was made in the 1933 and 1938 conventions by somewhat vague articles to the effect that laws and regulations for the protection of the national labour market shall not be applied "in all their severity" to refugees domiciled or regularly resident in a country. However, it is further provided that such laws shall be suspended altogether where the refugee has been resident in the country for not less than three years; where the refugee has married a national; where the refugee has a child or children nationals of that country; and, in the case of Nansen refugees, where the refugee is an ex-combatant of the Great War. But these articles have been subjected to many reservations.[2]

Articles common to both conventions[3] provide for "the most favourable treatment accorded to nationals of a foreign country" in respect of victims of industrial accidents, unemployed, and persons thus entitled to relief for sickness, infirmity, and the like. On a similar basis refugees are to be allowed the benefit of social insurance legislation, and the privilege of setting up their own associations for mutual assistance and relief. Most favoured national treatment is also to be accorded in the matter of educational facilities, and liability to taxation. Finally, both conventions contain a comprehensive article providing for the enjoyment by refugees of favours accorded to foreigners on a basis of reciprocity, even though in the case of the refugee there is necessarily no reciprocity.

Organization and administration

The many international organs which have been from time to time established to deal with the refugee problem have been largely concerned with aspects which are beyond the scope of this article. It is only in so far as they touch on matters of legal status and protection that they will be mentioned here. When the Nansen International Office for Refugees was set up in 1931, a sharp distinction was intended to be drawn between the humanitarian work of settlement, assistance, and the like, which was to be the province of the new office, and the political and legal protection of refugees which was to remain the function of the Secretary-General of the League.[1] But that implies a clear distinction between matters of law and matters of fact which is not always attainable in practice, and the Nansen Office did, in practice, and with the consent and co-operation of the Secretary-General, assume a large measure of responsibility for the political and legal protection of refugees.[2] Thus, the many cases of arbitrary expulsion have almost invariably been dealt with by the Nansen Office. Indeed, the average Nansen refugee came to regard his local Nansen Office representative in much the way as a national regards his local consul. For the German refugees similar quasi-consular functions were performed by the Office of the High Commissioner for Refugees coming from Germany. When Sir Neill Malcolm was appointed to the office, under the terms of the resolution of the Council of February 1936, one of his first tasks was "to prepare and arrange, in agreement with the Secretary-General, for the meeting of an inter-governmental conference with a view to arranging a system of legal protection for refugees coming from Germany".[3] The result was the provisional agreement of that year, followed by the convention of February 1938.

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[1] Article 6 of 1933; Article 8 of 1938.

[2] In the case of the 1933 convention by France, Czechoslovakia, Bulgaria, Denmark, and the United Kingdom; in the case of the 1938 convention by Belgium, the United Kingdom, Denmark, Spain, and the Netherlands.

[3] Except that whereas in the case of the 1933 convention the High Contracting Party contracts in respect of "its territories", in the 1938 convention it only contracts for "any of its territories to which the present convention applies". This modification obviously contemplates the possibility of the exclusion of colonial territories.

The Assembly had resolved that both the Nansen Office and the Office of the High Commissioner for Refugees coming from Germany should be wound up by the end of 1938 at the latest.[4] Accordingly, at its nineteenth session in September 1938, it was faced with the problem of providing some substitute to carry on the work of those organizations. It was decided to appoint a "High Commissioner for Refugees under the Protection of the League of Nations", who is responsible for both Nansen and German refugees. Sir Herbert Emerson has accepted the office, the appointment being for a period of five years as from January 1, 1939. The new High Commissioner has his head-quarters in London. He is not the legal successor of the former institutions and has no power to agree to the transfer to him of their liabilities or claims. In addition to the usual humanitarian functions he has the following legal functions:

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[1] See resolution of the 11th Assembly; document C. 609, M. 236, 1930, X.

[2] Note that the Nansen Office had under its statute the function of "facilitating within the limits of its competence, the application, in particular cases, of the arrangements that have been made for the benefit of refugees". The text of the statute is in C. 29, 1931, XIII.

[3] C. 72, 1936, XII.

[4] See *O.J.*, 1938, pp. 110 *et seq.*

> "to provide for the political and legal protection of refugees in accordance with the Assembly's decision of September 30, 1930;
>
> "to superintend the entry into force and the application of the legal status of refugees as defined more particularly in the conventions of October 28, 1933, and February 10, 1938".

To assist him in this work, he may, in agreement with the governments of the principal countries of refuge, appoint in those countries representatives approved by them.[1]

The Evian Conference of July 6 to 15, 1938, in which thirty-one nations took part, was mainly concerned with political and economic questions arising from the refugee exodus from Germany and what was formerly Austria.[2] The Intergovernmental Committee, to which the conference gave birth and which is now at work in London under the Directorship of Mr. George Rublee, has a similar scope, for it is charged "to continue and develop the work of the Intergovernmental Meeting at Evian". In particular, the Director is to "undertake negotiations to improve the present conditions of exodus and to replace them by orderly emigration"; also he is to "approach the governments of the countries of refuge and settlement with a view to developing opportunities for permanent settlement". However, the resolution adopted by the full conference on July 14, 1938,[3] also notes the need for continuing the work of providing documents of identity and travel, in the following section:

> "That, with regard to the documents required by the countries of refuge and settlement the governments represented in the Intergovernmental Committee should consider the adoption of the following provision;
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> "In those individual immigration cases in which the usually required documents emanating from foreign official sources are found not to be available, there should be accepted such other documents serving the purpose of the requirements of law, as may be available to the immigrant;

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[1] See *League of Nations Monthly Summary*, Sept. 1938; also *O.J.*, 1938, 365.

[2] The Conference, however, had the assistance of a legal sub-committee which investigated the municipal laws of the receiving countries in so far as they affected refugees. The report of this committee was afterwards placed in the archives of the League of Nations for consultation by Members.

[3] The text of the resolution is in League document C. 244, M. 143, 1938, XII.

"and that, as regards the document which may be issued to an involuntary emigrant by the country of his foreign residence to serve the purpose of a passport, note be taken of the several international agreements providing for the issue of a travel document serving the purpose of a passport, and of the advantage of their wide application."

Refugees and customary international law

Customary international law has little, if anything, to say concerning the individual refugee as such. He is an anomaly for whom there is no appropriate niche in the framework of the general law. It is for this reason that it has been necessary to establish a special conventional régime governing his legal status. But there is one aspect of the refugee problem to which the general and customary international law is relevant, and that is the consideration of the legality or illegality of the conduct of the state which creates a refugee population. Mr. James G. McDonald, in his now celebrated letter of December 27, 1935, intimating to the Secretary-General of the League his resignation from the office of High Commissioner for Refugees coming from Germany, said, "it will not be enough to continue the activities on behalf of those who flee from the Reich. Efforts must be made to remove or mitigate the causes which create German refugees."[1] The immediate cause is the treatment accorded by the Reich government to certain classes of its subjects, and the question which the lawyer has to ask is how far that conduct is in accord with or contrary to the recognized rules of international law?

Prima facie the treatment accorded by a state to its own subjects, including the conferment or deprivation of nationality, is a matter of purely domestic concern. But there is some authority for the proposition that even this comes within the ambit of international law when the treatment in question offends against those principles of justice and humanity which are recognized by civilized nations.[2] The numerous treaties concerning the treatment of minorities entered into since the middle of the last century may be regarded as evidence of a consensus of opinion among states regarding a certain minimum standard of conduct to be observed by governments towards those individuals who come under their sway. It is admitted by Mr. McDonald that, apart from the Upper

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[1] The text of the letter is in League document C. 13, M. 12, 1936, Annex.

[2] See the "Declaration concerning the International Rights of Man", adopted by the Institute of International Law, *Annuaire*, 1929, p. 298.

Silesian Convention of May 1922, Germany did not herself undertake any conventional obligations in this respect.[1] "But", he argues, "the principle of respect for the rights of minorities has been during the last three centuries hardening into an obligation of the public law of Europe." Indeed, an offence against principles of humanity to which those treaties bear witness has often been asserted both in writings[2] and in the practice of states[3] as justifying so-called humanitarian intervention. But the grounds which have from time to time been urged in justification of interventions are so numerous and so comprehensive[4] as to make this line of argument, attractive though it may be from a social point of view, dangerous for the practical lawyer. Moreover, those writers who are not prone to wishful thinking enter a *caveat.*[5]

A sounder line of approach would appear to be one which has regard not so much to the ethics of domestic policy as to the repercussions of that policy on the material interests of third states. Even if the state whose conduct results in the flooding of other states with refugee populations be not guilty of an actual breach of law, there can be little doubt that states suffering in consequence would be justified in resorting to measures of *retorsion*; which is defined by Oppenheim as "retaliation for discourteous, or unkind, or unfair and inequitable acts by acts of the same or of a similar kind".[6]

But there seems to be good ground for stating that the wilful flooding of other states with refugees constitutes not merely an inequitable act, but an actual illegality, and *a fortiori* where the refugees are compelled to enter the country of refuge in a destitute condition. The acknowledged aim of the Nazi persecution of "non-Aryans" has been to compel their emigration to other countries.[1] Whether this result be actually intended or not, as soon as the persecution of a minority does in fact result in a refugee movement which causes embarrassment to other states, the matter clearly becomes one of international concern. When, towards the close of the last century the United States was seriously embarrassed by an influx of destitute Russian refugees, President Harrison in his message to Congress of December 9, 1891, said:

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[1] Cf., however, Janowsky and Fagan, *International Aspects of German Racial Policies*, pp. 34–5, where it is argued that since Germany, in her "Observations on the Conditions of Peace", stated that she was resolved to treat her minorities according to the principles observed in the minority clauses of the peace treaties, and since the Allied and Associated Powers in their reply "took note of the statement of the German Delegates that Germany is determined to treat foreign minorities within her territory according to the same principles", Germany thereby incurred a conventional obligation to fulfil that pledge. The argument is ingenious and would seem to be in accord with strict theory, but it is submitted that it suffers from *nimia subtilitas* to be of much practical use in what Hall called "the rough jurisprudence of nations".

[2] See, e.g., Fauchille, *Traité*, 8th ed., Vol. I, pt. I, pp. 570–2; Borchard, *Diplomatic Protection of Citizens Abroad*, p. 14.

[3] Examples are collected in Janowsky and Fagan, *op. cit.*, Chap. I.

[4] See Winfield, *British Year Book of International Law*, 1924, p. 150.

[5] See, e.g., Hall, *International Law*, 8th ed., p. 342; Hyde, *International Law*, Vol. I, p. 120; Lawrence, *Principles of International Law*, 7th ed., p. 127; Winfield, *loc. cit.*; Oppenheim, *International Law*, 5th ed., Vol. I, p. 150.

[6] *International Law*, 5th ed., Vol. II, p. 112.

> "The banishment, whether by decree or by not less certain indirect methods, of so large a number of men and women is not a local question. A decree to leave one country is, in the nature of things, an order to enter another—some other. This consideration, as well as the suggestions of humanity, furnishes ample ground for the remonstrations which we have presented to Russia," &c.[2]

Granted that the treatment accorded by a state to its own subjects, including the conferment and deprivation of nationality, is a matter to be regulated by the municipal law, yet, as has been pointed out by the Permanent Court of International Justice, "from the standpoint of international law . . . municipal laws are merely facts which express the will and constitute activities of states".[3] In other words, the operation of municipal laws may result in a breach of international law in precisely the same way as any other form of state activity. If a doctrinal ground be required for regarding as illegal the conduct of a state of origin of destitute refugees, it will be found in the generally accepted doctrine of the abuse of rights.[4] Domestic rights must be subject to the principle *sic utere tuo ut alienum non laedas*. And for a state to employ these rights with the avowed purpose of saddling other states with unwanted sections of its population is as clear an abuse of right as can be imagined.

Not only is it an abuse of right, it is an evasion of the undoubted duty of a state to receive back its own nationals.[5] This duty is not to be construed in a technical fashion which deprives it of all real meaning. It cannot mean that a state can evade this duty by the simple process of denationalization; in other words, it cannot evade a duty by the abuse of right.[6] Nor can it mean, it is submitted, that a state can evade the duty by the creation of internal conditions which make it impossible for a humanitarian government to insist on the return of nationals. Otherwise the duty to receive back is bereft of all real significance.

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[1] See *The Times* newspaper, Dec. 13, 1938.

[2] *British and Foreign State Papers*, Vol. 83, pp. 436–7.

[3] Series A, No. 7, 19.

[4] See Lauterpacht, *Function of Law in the International Community*, Chap. XIV.

[5] Oppenheim, 5th ed., Vol. I, p. 514.

[6] See Report of the League Committee in document C. 72, 1936, XII; "It was

If the conduct of the state of origin be in the first place illegal, it seems to follow that it is under a duty to assist settlement states in the solution of the problem to which it has given rise. Thus, in the report of the Committee on International Assistance to Refugees, which was presented to the Council of the League on June 20, 1936, it is said that:

> "In view of the heavy burden placed on the countries of refuge, the Committee considers it an international duty for the countries of origin of the refugees at least to alleviate to some extent, the burdens imposed by the presence of refugees in the territory of other states."[1]

It is, of course, impossible to elaborate these arguments in an article of this kind; it is only possible to indicate the main issues involved.

In conclusion, it must be emphasized that although the bulk of the international law of refugeedom consists in conventions designed to confer upon the individual refugee the rudiments of a legal status, the provision of such conventions does not in itself offer any final solution of the major problem: it is a necessary interim measure of alleviation. Short of stemming the tide at its source along the lines indicated by Mr. MacDonald, there are ultimately only two solutions, namely, repatriation, and naturalization in the country of refuge. Both repatriation and naturalization are almost invariably slow of achievement. Repatriation must await a radical change in the attitude of the country of origin. Naturalization is subject to a number of obstacles of a political and economic nature; it requires the consent both of the

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doubtless one of the sovereign rights of states to withdraw the nationality of their nationals in specific cases. But there was in everything the right and the abuse of the right."

On the whole subject of denationalization see Fischer Williams in *B.Y.I.L.*, Vol. VIII, pp. 45–61.

[1] See C. 2, M. 2, 1936, XII. Cf. also the preamble to the Resolution of the Evian Conference:

"Considering that, if countries of refuge or settlement are to co-operate in finding an orderly solution of the problem before the Committee, they should have the collaboration of the country of origin and are therefore persuaded that it will make its contribution by enabling involuntary emigrants to take with them their property and possessions and emigrate in an orderly manner."

At the time of writing the Intergovernmental Committee is in negotiation with the German Government on this point.

refugee and of the state concerned, and the fulfilment of municipal law requirements such as a residence qualification. In the meantime the conventions are necessary to provide the refugee with some measure of protection, and to enable him to travel to and establish himself in that country where the radical solution of complete legal assimilation in the form of naturalization is most likely to be achieved.

NOTES

PROFESSOR J. W. GARNER

The death of Professor James Wilford Garner took place at Urbana, Illinois, on December 9, 1938. His death is a grievous loss to the world of international law. His writings and his frequent visits to Europe had brought him into close touch with those who are interested in the subject on this side of the Atlantic, where his devotion to his work, the range of his knowledge, and his fairmindedness were greatly appreciated.

For many years past Professor Garner had been a valued contributor to the *British Year Book of International Law*, having frequently written articles which have appeared in its pages and having since 1927 been the author of the notes on decisions and awards in the American courts and various claims commissions.

ACADEMY OF INTERNATIONAL LAW

Session of 1938

The session of the Academy held in 1938 was very successful. The number of students who attended the courses of lectures at The Hague was slightly higher than in either of the previous years, so also was the average attendance at individual lectures. The total number of students was 389, of which well under a half were of Dutch nationality. The number of students from England remains lamentably low—there being only twelve all told, and even of these several would scarcely be counted as students in the ordinary sense of the term.

Two of the courses of lectures were delivered by Englishmen. Professor H. A. Smith, Professor of International Law in the University of London, delivered a course of five lectures on modern developments in the laws of naval warfare, and Mr. John Foster, of Oxford, delivered a course of ten lectures on the general rules governing conflicts of laws. Both courses were well attended.

The 1939 session of the Academy will as usual be held in July and August. Among the courses of lectures which will be delivered is a course by Mr. C. Wilfred Jenks, of the International Labour Office, on the Drafting of Multipartite Conventions, and a course by Mr. B. A. Wortley, Reader in Law in the University of Manchester, on Problems raised by Confiscatory Legislation.

The lectures delivered by Professor Lauterpacht of Cambridge in 1937 on the General Laws of Peace are printed at p. 99 of Volume 4 of the *Recueil* of the Academy for 1937 (Vol. 62 of the general collection), and those by Mr. Llewelyn Davies on the General Rules relating to Conflict of Laws at p. 427 of the same volume.

THE DICTIONARY OF PUBLIC INTERNATIONAL LAW TERMS

Arrangements have now been made for the publication of a dictionary of public international law terms. The work is to be edited by Professor Basdevant, and is to be produced under the control of a committee presided over by M. Arnold Raestad.

The idea of producing an Encyclopedia of International Law is old, and attempts have been made from time to time to realize it. Works published under the title of "Dictionary of International Law" have, with few exceptions, the character of encyclopedias, that is to say they expound international law rules according to a doctrine, that of their authors. The idea of compiling a "dictionary" of international law in the strict lexicographical sense of the word is a comparatively new one. That this should be the case is perhaps not to be wondered at, as the elaborating of such a dictionary on scientific lines requires an immense collective effort. As it would seem, one had to await the coincidence of two events—that scientific lexicography should develop its technique into full maturity, and that the difficulties inherent in the interpretation of terms of international law should, under the sheer weight of accumulating texts, become very apparent both to individual scholars and to Foreign Offices and international tribunals.

In September 1938 the Union Académique Internationale, which groups together the Academies of Science and Letters of some twenty countries, acting through its President, Dr. Waldo G. Leland, included in the number of its enterprises the production of a *Dictionnaire de la terminologie du droit international public.* In November 1938, the work of analysing and excerpting documents commenced in Paris under the leadership of Professor Basdevant. The preparation of the Dictionary is scheduled to last for five years.

At the time when the Union Académique Internationale extended its patronage to the new enterprise, four years of preparatory studies had already been devoted to the work.

In the autumn of 1934, M. Max Huber first outlined the idea. In 1935 the Norwegian Academy of Science and Letters at Oslo brought the scheme before the U.A.I., which had previously examined a proposal to publish an Encyclopedia of International Law emanating from the Dutch Academy of Science, Amsterdam. A Committee of Scientific Direction was appointed and started at once laying down the principles according to which the work would have to be carried out. The recommendations of the Committee have in due course been adopted by the U.A.I.

The Committee (which provides for changes in its membership by co-optation) is at present constituted as follows: M. Raestad (Chairman), MM. Anzilotti, Basdevant, Jonkheer van Eysinga, Huber, Manley O. Hudson, Sir Cecil Hurst, Pilotti, Charles De Visscher.

The Dictionary is essentially one of French terms, but it will likewise note such English, German, Italian, or Spanish terms as are effectively used in the sources as equivalents to French terms.

The sources analysed will in the main be official documents only and will comprise treaties, diplomatic correspondence, the proceedings of international diplomatic conferences, resolutions of international organs, judgments by, and pleadings before, international tribunals. Scientific works of a collective character will be utilized, the purpose being to illustrate the signification of terms. The period covered will, in principle, run from 1856 to the present day.

Following the principles which modern lexicography adopts in elaborating an historical dictionary of a language, the Dictionary will purport to give the different significations in which the word or expression is used in the sources.

A list of the words and expressions to be dealt with in the Dictionary has been compiled.

The Dictionary will be published by the firm of Sirey, Paris.

The index-file (*fichier*) which for a certain number of words and expressions will contain references much in excess of those carried over into the Dictionary may prove to constitute by itself a useful instrument of documentation. It will probably be deposited at the Permanent Court of International Justice, The Hague.

Co-operation has been established between the Editor of the Dictionary and a number of international institutions, including the Registrar of the Permanent Court of International Justice and the Secretariat and the International Labour Organization of the League of Nations.

Up to now, the following Academies of Science and Letters have undertaken to contribute to the financing of the enterprise: the Norwegian Academy, Oslo (which is acting as fiscal agent of the enterprise), the French Académie des Sciences Morales et Politiques, the British Academy, the Italian Union of Academies, the Japanese Academy, the American Council of Learned Societies, the Dutch Academy, Amsterdam, the Belgian Academy, the Polish Academy, Kraków, and the two Finnish Academies, Helsingfors.

A. R.

CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW

Professor Gutteridge and Professor Lauterpacht have arranged for the issue of a new series of Cambridge monographs on subjects connected with public and private international law. The decision to issue this new series has been taken because of the increasing difficulty that is felt in dealing comprehensively either with public or private international law in a single textbook and because of the growth of interest in comparative law. It is hoped by this means to fill a serious gap in English legal literature.

Arrangements have already been made for the following volumes:

"Recognition in International Law", by Professor H. Lauterpacht, LL.D.
"The International Labour Organization", by C. W. Jenks, M.A.
"Full Powers and Ratification", by J. Mervyn Jones, M.A.
"A Comparative View of the Law of Marriage", by Sir Maurice Amos, K.B.E., K.C.
"The Conflict of Laws with regard to Contracts", by D. J. Llewelyn Davies, M.A.
"The Scope and Method of Comparative Law', by Professor H. C. Gutteridge, K.C., LL.D.

The series will be known as Cambridge Studies in International and Comparative Law, and will be published by the Cambridge University Press. It will be edited by Professor Lauterpacht and Professor Gutteridge.

C.

INTERNATIONAL LAW ASSOCIATION AMSTERDAM CONFERENCE

The Fortieth Conference of the International Law Association was held in Amsterdam, from August 29 to September 3, 1938. This Society meets now every two years, which explains why the Fortieth Conference is held in the eighty-sixth year of its age. It was founded in Brussels in 1873, while the Institut de Droit International was founded in the same year at Ghent.

The President of the Dutch Branch, Mr. J. van Hamel, was elected President of the Association, while Lord Macmillan (Chairman of the Executive Council) was elected President of the Conference. There were present amongst others Mr. de Geouffre de La Pradelle (retiring President), Dr. H. A. Simon (President of the German Branch), Mr. P. J. Kooiman (Secretary of the American Branch), Professor A. Asquini of Rome, Professor Makowski, Mr. Th. Boye (Judge of the Supreme Court of Norway), Professor E. Borel (President of the Swiss Branch), Dr. de Auer (member of the Council of the Hungarian Branch). Altogether the attendance numbered 440, only six short of the record attendance at Vienna in 1926. Our hosts formed the strongest contingent, with 151; next, British Empire 112; Germany 54; France 35; Belgium and Poland 16; U.S.A. 8; Norway 6; Denmark and Switzerland 5; Czechoslovakia and Yugoslavia 3; Greece, Italy, Spain, and Sweden 2; Bulgaria, China, Latvia, and Luxembourg 1. The contingent from the United Kingdom was larger than usual and included Lord Macmillan, Sir Cecil Hurst, Sir George Rankin, General Sir George Macdonogh, Sir Ugo Mifsud, Sir Lynden Macassey, and Professor Brierly.

It can hardly be said that the achievements of the Fortieth Conference were very important. The programme was overloaded, and as a consequence the Conference met in sections, which is not only expensive but somewhat unpractical because some of the harder heads who might keep debates on public international law steady are attracted by the more serious discussions in the section of private international law.

The Conference was opened on the Monday morning, August 29, by Prince Bernhard of the Netherlands, who speaks excellent English. In the afternoon Section A under Mr. de G. de La Pradelle, the retiring President, considered Conciliation between Nations. The Committee on this subject had no report to present and, to fill the gap, I ventured therefore to lay before the Section some views on aggression and the aggressor with which I had troubled the Grotius Society at its meeting on March 17, 1938. The gist of these was that it was necessary to distinguish between the concepts of aggression and the aggressor, for while the definition of the former might be for a legislature, the identification of the latter was for a tribunal. A proposal to undertake a critical examination of the Covenant of the League and of the Pact of Paris was negatived. It will be remembered that this committee submitted to the Budapest Conference of the Association a set of articles of interpretation of the Pact of Paris which was adopted, and was later noticed in an interesting debate in the House of Lords on February 20, 1925. The prime mover in all this was the Honorary General Secretary of the Association, Mr. Wyndham Bewes, who for his work on this occasion was made an Honorary Vice-President of the Association. The text of the debate in the House of Lords will be found in the Budapest report on page 310.

In Section B that afternoon Reciprocal Trade Agreements were considered (Dr. de Auer in the Chair).

The whole of the following day, in Section A, the Protection of the Civil Population against New Engines of War (Lord Macmillan in the Chair) was considered, and Business Contracts with Foreign Governments (Dr. H. A. Simon in the Chair) in Section B. Section A had before it a draft convention in thirty-two articles, but it was not found possible to examine this article by article, nor, as it was confessed in the report, had the committee itself done this. Nevertheless, the Section gave a qualified approval of the report in the following terms: "That this Conference, without committing itself to any of the detailed provisions of the draft convention presented by the Committee for the Protection of the Civilian Population against New Engines of War, approves of the idea in general principle and requests the Committee to remain in office for the purpose of co-operating with the Luxembourg Committee and to continue its studies of the many questions involved in the draft convention, having regard to the opinions expressed at the Amsterdam Conference." The voting was 22 to 14.

When this resolution of the Section came up to the plenary Meeting on September 2 it was objected that an approbation *de principe* could not be given to something which had not been studied. This objection was lost by 45 to 51. The Plenary Session, however, is not the final court of appeal for those who deprecate premature resolutions, for, according to a curious provision of the constitution of the Association, it is a function of the Executive Council to examine and settle the proceedings of a Conference. This was done in London on October 24, when it was decided that this and other resolutions passed at Amsterdam, representing as they did merely domestic progress, should not be circulated to governments. The opposition to the proposals did not come from those who thought the civilian population ought to be bombed, but rather from those who wished to know what the civil population was, and however pressed for time the committee or the Conference might have been, it might at least, in asking for approval of the report, have found time to study the definition of the civil population given in the draft convention. This was not done, with the result that no one knew what the very title of the project meant. The civil population is defined in the draft convention as follows: "All those not enlisted in any branch of the combatant services nor for the time being employed or occupied in any belligerent establishment." In the course of a vigorous intervention by Lieut.-General Sir George Macdonogh, reported in *The Times* of August 31, 1938, this over-simple definition was criticized in the following terms: "Those who hold that war can be fought out between the combatants themselves, hold a theory which is quite untenable. You might just as well say, 'Let us go back to the days of bows and arrows.' If we did, we would certainly protect the civil population much more easily than at present. War to-day is not a war between the various armies. Whether we like it or not, it is now war between nations. Warfare is becoming more and more mechanized, and that means that the most important things in war are machines which are furnished to the fighting troops. These machines are made by the civilian population behind the lines, and I would submit that the civilian who makes munitions, who produces coal from the mines, who produces iron from the mines, who is in charge of an oil installation, who is in charge of transport and administration, is just as important from the military point of view as the man in the fighting-line. It seems to me that the first thing that has to be done is to find a definition of the word 'civilian' and to determine who are the people we are trying to protect."

This matter is the subject of special study by the Comité d'Information et d'Action pour la Protection de la Population Civile en temps de Guerre under the patronage of H.R.H. the Prince of Luxembourg, with whom telegrams were exchanged during the Conference.

Wednesday August 31 was a holiday, being the Queen of the Netherlands' birthday, and the following telegram was dispatched to Her Majesty: "In the name of the members of the International Law Association gathered at Amsterdam for the Fortieth Conference, may we offer to Your Majesty, with the most profound respect, our congratulations on this memorable day. May we also proffer our felicitations on the forthcoming celebration on the fortieth anniversary of Your Majesty's accession to the Throne. van Hamel. Macmillan."

On Thursday the Neutrality section sat all day under the chairmanship of the new President of the Association Mr. J. A. van Hamel, while in Section B Commercial Arbitration (Lord Macmillan in the Chair) was considered.

The Neutrality committee brought up the following five resolutions: "(1) Through general non-observance, Art. 16 of the Covenant of the League of Nations appears to be at the present time inoperative. (2) The rights and duties of neutrals should be examined in the light of the renunciation of war contained in the Pact of Paris. (3) Neutrality still exists as between non-members of the League and as between Members and non-members. (4) According to the practice of nations, neutrality is not abrogated, even as between Members of the League. (5) The Neutrality committee is accordingly requested to submit to the next Conference of the Association their draft Convention on Neutrality, taking into consideration the changes, if any, wrought by the Covenant of the League of Nations, the Pact of Paris, and any other general international instruments, and the practice of non-intervention."

There was also an excellent paper by Professor Scheuner of Jena. As was to be expected, resolution No. 1 led to a lively discussion. When it appeared that this resolution must be lost and might have to go back into the body of the report, a compromise was found in the insertion of the words "at the present time" after the word "be", which was accepted. Professor Scheuner's paper shows what has long been suspected, namely, that the decease of neutrality has been prematurely announced. His paper will be found in full in the forthcoming report of the International Law Association. The section obtained leave of the Assembly to submit to a future Conference the draft convention on which it has been working for some fourteen years, it having been resolved at Stockholm on the motion of Dr. Witenberg "That the problem of Neutrality remains on the order of the day of the International Law Association until its solution in the form of a convention". Part of its object is to provide a code for the use of soldiers, sailors, airmen, and administrators: the chairman is Dr. Th. Boye, Judge of the Supreme Court of Norway.

In Section B (Commercial Arbitration), Lord Macmillan in the Chair, Sir Lynden Macassey presented a report on behalf of the committee and Mr. J. P. Govare on behalf of the sub-committee. The following resolution was approved by the Executive Council at its meeting on October 24: "The Association, after having taken into consideration the reports of the Commercial Arbitration Committee and of the French Sub-Committee, does not on this occasion approve finally of the rules proposed in either of the reports, but recommends that a committee be formed to endeavour to arrive at agreed rules, consistent with national systems, in the light of both drafts and all other relevant information. The committee is to report to the Executive Council, which is hereby empowered to publish, on behalf of the Association, any rules so agreed as the Amsterdam Arbitration Rules, 1938, or, if serious differences still remain, to defer the whole matter to the next Conference. (Committee appointed accordingly: Lord Macmillan (Chairman), MM. Boeg, Fraser, Govare, Palliccia, Simon, Sir Lynden Macassey (Convener), with power to co-opt an American member.)"

It is to be noted that in the resolution as it came up from the Section to the plenary Assembly, instead of the words "agreed rules consistent with the national systems" the words "an agreed code acceptable both to Anglo-Saxon and

Continental systems" appeared. The defeatist attitude is sometimes taken up that in view of the irreconcilability of these systems no agreement is to be expected in matters of this sort, but this is to overlook the fact that practical men exist everywhere and that our continental friends do not, without exception, argue from the general to the particular, but are on the contrary not unfamiliar with the advantages of the argument from the particular to the general. It is, for instance, often thought and indeed taught that our continental friends have no use for case law; nor are such likely to recognize it in the term *jurisprudence* which is rarely properly translated in a French-English dictionary.

The discussions on État Civil were not without interest. This device, unfamiliar to Anglo-Saxon institutions, is a sort of internal passport whereon are recorded particulars of every person from birth to death. This has the advantage of making bigamy very difficult, but on the other hand is unpalatable to those who object to overmuch regimentation. Fears were expressed, not by Anglo-Saxons, that international arrangements facilitating the exchange of such particulars might be used repressively. An amusing incident occurred where the word "demographic" in the mouth of an orator to whom some one would apply the mysterious word "reactionary" was understood as "democratic", and applauded as such by some one present who appeared to have strong views as to the superiority of one particular political system over another. The following resolution was passed: "Cette Association, après avoir procédé à la discussion du rapport sur l'échange international de données concernant l'état civil des personnes, prie l'Executive Council de confier l'étude de ce problème quant au principe et aux détails, à une commission instituée par l'Executive Council"; and at a meeting of October 24 the Executive Council appointed the following: MM. Methorst (Chairman), Gutzwiller, Bernier, and Wahl.

The hospitality of the Dutch, it need hardly be said, was lavish. They showed indeed a tendency rather to fit the business into the festivities than the festivities into the business. At the banquet at the Krasnapolsky on September 2, Lord Macmillan thanked the Queen's Government, the City of Amsterdam, and the Netherlands Branch for the friendly reception and great hospitality that had been accorded to the members of the International Law Association gathered together at Amsterdam for their Fortieth Conference. He stressed the fact that men of goodwill from twenty-three nations had met together for a week, at a time of extreme international tension, to discuss in a spirit of harmony and understanding highly controversial subjects which, in some hands, might have been as dangerous as explosives. He ascribed the success of the Conference to that spirit of tolerance which has always been the proud heritage of the people of the Netherlands, and also to the fact that lawyers, dismissing all extraneous matters, judge every issue by the law and the law alone. The Minister of Justice, who replied, expressed the pleasure of the Government of the Netherlands at once again receiving the members of the International Law Association in Holland, and thanked Lord Macmillan for his references to Her Majesty the Queen, Her Government, and people.

At the closing meeting, Saturday, September 3, the new President (Mr. van Hamel) moved that in honour of Grotius and his work a delegation be appointed to proceed in solemn session to the Castle of Loewenstein, so closely associated with his memory, and there in the name of the Association to unveil a plaque dedicated to one who amidst the difficulties of the times sought to promote law, peace, and moderation among the nations and whom those who are pursuing the same ends desire to commemorate. This was accordingly done on the Sunday and was attended among others by the following: Mr. J. A. van Hamel, Mr. de Geouffre de La Pradelle, Dr. Simon, Professor Asquini, Lord Macmillan, and Sir George Rankin, President of the Grotius Society.

F. T. G.

THE "CONTIGUOUS ZONE"

It will be remembered that in 1930 the Codification Conference held at The Hague under League auspices made an unsuccessful attempt to draw up a code upon the law of territorial waters. The questionnaire circulated to states before the conference included a question which raised the issue of the so-called "contiguous zone", that is to say, the question whether it can ever be permissible to assert jurisdictional rights over foreign ships outside the territorial limits. Great Britain replied denying the existence, except in the case of piracy, of any such legal right, unless it was conferred by treaty. The replies returned by the Dominions, including Canada, were to the same effect.

In 1936 the Canadian Parliament enacted a statute (1 Edw. VIII, c. 30) designed to arm the executive with more adequate powers for dealing with the activities of liquor smugglers. In this Act the principle of two distinct zones is clearly affirmed. "Canadian waters" are defined in accordance with the traditional three-mile rule, the base-line in bays being determined by the "ten-mile rule" of the North Atlantic Fisheries Award. But outside the three-mile zone the Act creates an innovation by claiming a further zone of "Canadian customs waters", which are defined as being "the waters forming that part of the sea which is adjacent to and extends nine marine miles beyond Canadian waters".

The fourth section contains detailed provisions for dealing with ships suspected of liquor smuggling, and the jurisdiction is defined in the following terms:

> "The provisions of this section shall extend to vessels hovering in Canadian waters, and in the case of any vessel registered in Canada, or of any unregistered vessel owned by a person resident or domiciled in Canada, or of any other vessel or class of vessels which the Governor in Council may specify or enumerate by proclamation shall also extend to vessels hovering in Canadian customs waters."

The text of the statute thus clearly asserts the claim to exercise jurisdiction over foreign vessels found "hovering" in the extended zone. The proclamation actually issued, which seems to have been drafted after discussions with the United Kingdom, limits the operation of the section to ships registered in Great Britain and the British Empire, exclusive of the Dominions. In this way care has been taken to avoid the occurrence of incidents which might give rise to controversies with foreign powers. It remains true, nevertheless, that the statute formally asserts the right to interfere with ships under foreign flags in "customs waters", and it may therefore prove to be of controversial value in international disputes which involve the question of the contiguous zone.

It may well be asked whether further controversy upon this question is really necessary. The Canadian statute, which follows the lines of similar legislation in many other countries, is dictated by a proved practical need, for it is now a matter of common experience that the three-mile limit is often inadequate for the proper protection of legitimate national interests in time of peace. The law of nations, if it is to retain its authority, must show itself capable of responding to practical needs, and in one form or another the principle of the contiguous zone must therefore obtain recognition. So much is admitted by the British reply to the League questionnaire, but the reply goes on to assert that any extension of jurisdiction beyond the three-mile zone must rest upon the letter of specific treaties. In effect this reduces the difference between the two points of view to a question of procedure. On the one theory, the fact that the principle of the contiguous zone is dictated by reason and by practical necessity suffices to make it a rule of the law of nations. On the other theory, the principle has no independent existence, but must be constructed piecemeal by a series of special treaties. The duty to make such treaties in proper cases is admitted by the British reply to the League questionnaire. It seems hardly worth while to deny the existence of the right if we admit the duty to create it.

A word of caution must be added. The principle of the contiguous zone, properly understood, is of strictly limited scope. It does not involve an extension of territorial waters, and this distinction is correctly drawn in the Canadian statute, as it is in the Anglo-American Liquor Convention of 1924. The maritime belt forms part of the national territory, and jurisdiction there is exercised by virtue of the right of sovereignty. Outside the national territory interference with foreign ships can only be justified upon the principle of self-defence, and must therefore be limited to those ships which are reasonably suspected of approaching the maritime belt with a view to committing crimes within the territory. For this reason the doctrine of the contiguous zone cannot be interpreted to justify a claim to monopolize the fisheries outside territorial limits, since a monopoly can only be asserted as an exercise of the right of sovereignty within an area subject to sovereignty. Again, the doctrine cannot justify claims to an extended zone for the protection of neutrality in time of war. The contiguous zone remains part of the high seas, and every part of the high seas is open for the lawful exercise of belligerent rights. All that neutrals are entitled to demand is that the belligerents shall refrain from acts of war within the area subject to neutral sovereignty.

H. A. Smith.

BELLIGERENT AIR ATTACK ON CIVIL AIRCRAFT

There have been instances of attacks by belligerent military aircraft upon civil aircraft in the hostilities in Spain and China. A French passenger aeroplane was attacked in northern Spain in May 1937; in February 1938 an Imperial Airways liner was fired upon in China. In neither instance was any serious damage done. They were instances, it will be noted, of attacks on *neutral* civil aircraft.

The other and much more serious incidents were attacks on *belligerent* civil aircraft. They occurred on August 24 and September 5, 1938, and the civil aircraft concerned belonged respectively to the China National Aviation Corporation and the Eurasia Aviation Corporation. The former company is a Sino-American, the latter a Sino-German undertaking; in each company the Chinese Government has a controlling interest, and the aircraft were of Chinese nationality and bore Chinese markings.

The attack upon the air-liner (a Douglas machine) of the China National Aviation Corporation took place while it was on a flight from Hong Kong to Wuchow. It was encountered by a Japanese naval air squadron, which was on the way to bomb the perpetually harassed Canton–Hankow railway. According to the Japanese official statement, the air-liner tried to hide in the clouds and thus to escape detection. No markings could be observed, and the Japanese airmen concluded that it was an enemy military aircraft. They pursued it, opened fire upon it with their machine-guns, and forced it to land at the mouth of the West (Canton) River, near Macao, where it sank. It was located next day by a British gunboat, H.M.S. *Cicala*, in 40 feet of water, and was subsequently salvaged. Of the seventeen occupants, fourteen (all Chinese, including three women and two children) lost their lives. Only the pilot—an American named Woods—and two Chinese—the wireless operator and a passenger—escaped. According to the statements of Mr. Woods and the wireless operator, they were both fired upon while swimming to the shore. It was admitted by the Japanese Foreign Office that the air-liner itself was fired upon "for a very brief period after its landing".

By remarkable good fortune no lives were lost in the other incident, when an Eurasia air-liner was attacked by three Japanese machines near Yuntan, on the Kwantung–Kwangsi border, on September 5. The petrol tank was holed, but the pilot, a German named Lutz, succeeded in making a forced landing at Liuchow. The aircraft had been hit in ten places.

In the statement issued by the Japanese Foreign Office on August 26 it was stated that since the beginning of hostilities Japan had observed the rules which are contained in the draft convention prepared at The Hague in 1923 on the subject of air warfare, one of which "explicitly provides that a civilian aeroplane flying near the air forces of a belligerent or entering a zone of hostilities is liable to attack". The C.N.A.C. air-liner, it was added, was "within the zone of hostilities". What the rule which must be referred to—Article 34—actually says is that belligerent non-military aircraft are liable to be fired upon if they fly "(1) within the jurisdiction of the enemy, or (2) in the immediate vicinity thereof and outside the jurisdiction of their own state, or (3) in the immediate vicinity of the military operations of the enemy by land or sea". It might perhaps be held that the air-liners on both the occasions in question came within the third of these headings; but the more precisely relevant rule is that in Article 33, which provides that belligerent non-military aircraft flying within the jurisdiction of their own state (as both the air-liners were) are liable to be fired upon "unless they make the nearest available landing on the approach of enemy military aircraft". Whichever rule is held to apply, there can be no excuse for the action of the Japanese airmen in continuing to fire upon the C.N.A.C. liner after it had been forced down, still less for firing upon the pilot or wireless operator while swimming ashore, or, indeed, for firing at all once the liner showed that it was coming down. Their action, one can only surmise, was due to the excitement of the individual airmen or else to deliberate "frightfulness"; it could not be condoned either under the draft rules of 1923 or under the general principles of international law.

So far as this particular feature of the incident was concerned there was ample justification for the protest made by the American Ambassador, Mr. Grew, to the Japanese Government. In so far, however, as the protest also implied that in no circumstances is it lawful to attack an unarmed civilian aeroplane "engaged in clearly recognised and established commercial services over a regularly scheduled air route", it is questionable whether the protest can be wholly supported in the existing state of international law. Such a rule would certainly go beyond that which the Commission of Jurists proposed in 1923. Even on a regular, scheduled air route it may be necessary to compel an enemy air-liner to land so that its contents can be examined. Under the rules of 1923 even a neutral civil aircraft may be compelled to land if it is flying within the jurisdiction of one belligerent and is warned of the approach of the other belligerent's military aircraft (Article 35).

In a statement issued by the Japanese Foreign Office in regard to the incident of September 5, it was pointed out that the Eurasia Company had given the Japanese authorities no previous notice of the time of departure and intended course of the air-liner. The inference is that if such notice had been given the aircraft would not have been compelled to land. If this may be taken to represent Japanese practice, it marks an advance, in the interests of civil aviation, upon the rule proposed by the Commission of Jurists. Their rules, it should be added, still remain a draft only; they will be revised, no doubt, in the light of experience acquired since 1923 if, at some future time, they are to be embodied in a convention.

J. M. Spaight.

THE FORM OF FOREIGN OFFICE CERTIFICATES

In *The Arantzazu Mendi* decided by the Court of Appeal[1] on November 1, 1938, Lord Justice Slesser subjected to some mild criticism a passage in the letter sent by the Foreign Office on the question of the degree of recognition accorded to the insurgent (Nationalist) government in Spain. He pointed out that it was inaccurate to say that *His Majesty's Government* recognized the Republican or the Nationalist Governments of Spain in some capacity or other. The proper form, he said, was that *His Majesty* recognized the Republican or Nationalist Government, and he regretted "the evil days" on which the Foreign Office has fallen in this respect. It is believed that the irregularity, if any, is of long standing. Thus, for instance, in *Luther* v. *Sagor*,[2] the court was informed that "His Majesty's Government recognize the Soviet Government as the *de facto* Government of Russia". Undoubtedly, the conduct of foreign affairs, including the question of recognition, is within the prerogative of the Crown and, in strict constitutional theory, it is His Majesty who is the ultimate authority. But, as suggested by the learned Lord Justice, the government is the constitutional instrument through which His Majesty acts. This being so, there seems to be no logical objection to connecting the act of recognition with the instrument properly authorized to perform that function on behalf of the Sovereign, namely, with His Majesty's Government. This has, in fact, been the almost uniform practice of the Foreign Office; it has not so far met with criticism on the part of courts.[3] A departure from the established practice may seem to be undesirable at a time when the various parts of the British Commonwealth of Nations are apt to show a pronounced degree of independence on questions of foreign affairs, including that of recognition. It is more convenient to ascribe divergencies of action in the matter to the respective governments of the independent units within the Empire than to the indivisible personality of the Crown.

The Arantzazu Mendi and the other Spanish cases decided in 1938 raised some more substantive questions relating to the certificates of the Foreign Office.

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[1] [1938] 4 All E.R. 267; and see p. 150 below.

[2] [1921] 3 K.B. 532.

[3] This was also the terminology used by Lord Eldon in the various recognition cases decided by him: *City of Berne* v. *Bank of England*, 9 Ves. Jr. 347, 348; *Jones* v. *Garcia Del Rio* (1823), Turner and Russell 297.

In *The Arantzazu Mendi* the crucial passage of the reply received from the Foreign Office was that "His Majesty's Government recognizes the Nationalist Government as a government which at present exercises *de facto* administrative control over the larger portion of Spain". Unlike, for instance, the cases of *Luther* v. *Sagor*[1] or *Bank of Ethiopia* v. *Bank of Egypt and Liguori*,[2] there was no express reference to the recognition of a *de facto* government. In *Banco de Bilbao* v. *Rey*,[3] in a letter written on February 17, 1938, the form used was that "His Majesty's Government in the United Kingdom recognize the government of General Franco as an insurgent government which at present exercises *de facto* effective administrative control over a considerable portion of Spain". In addition to the absence of a clear reference to the recognition of a *de facto* government, the unusual wording of the reply raised the question, which does not seem to have been considered by the Court of Appeal, whether and how far the recognition as a government was qualified by the word "insurgent". Diplomatic practice shows no instance of an express recognition of an "insurgent government". In the certificate issued on March 8, 1938, in *Compañia Naviera Sota y Aznar* v. *Ramon de la Sota* (an unreported case which was heard for several weeks before Mr. Justice Crossman and settled by agreement) it was stated that "His Majesty's Government in the United Kingdom recognizes the government of General Franco as a *nationalist* government which at present exercises *de facto* effective administrative control over a considerable portion of Spain". The expression "nationalist government" is not a term which has any recognized meaning in international law or, for that matter, in political science. Probably in each of these three cases, where different language was used to describe the same state of affairs, the emphasis was not on the nature of the government in question, but on the circumstance that it wielded effective power. Such unorthodox terminology, when coupled with a rigid adherence to the technical distinction between *de jure* and *de facto* recognition and with a complicated statement as to the degree of recognition accorded to the rival governments, may result in a declaration which is a source of difficulty for the court. It is a debatable question whether a reply of this nature affords good ground for criticism. It is the duty of the Secretary of State to inform the court of the facts, and if the facts are complicated and unprecedented, his statement cannot be an example of lucidity. On the other hand, as the foreign relations of the Crown ought to be conducted within the framework of international law, it is arguable that the statement of the responsible minister of the Crown should be couched in terms which have an accepted meaning in international law. They are statements as to legal status, and if they are to be at all useful they ought to be couched in legal terms descriptive of status. This, it may be rightly objected, is a counsel of perfection when the situation is unprecedented and when circumstances demand a departure from established forms. However, even in such cases it is desirable to frame the statement so as to make it approximate, so far as possible, to accepted terminology. Such ambiguity as necessarily remains must, as in the corresponding case of statutes, be dealt with by the court with the help of the rule of interpretation which assumes that the intention of the government is to abide by the rules of international law and the international obligations of this country.

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[1] [1921] 3 K.B. 532.

[2] [1937] Ch. 513: "His Majesty's Government . . . now regard the Italian Government as the Government *de facto* of the parts of Ethiopia which they control."

[3] [1938] 2 K.B. 176; [1938] 2 All E.R. 253.

Finally, the problem arises as to the position created by the refusal of the Secretary of State to give a direct answer to the question put to him. As pointed out by Roche J. in *Luther* v. *Sagor*,[1] "the proper sources of information as to a foreign power, its status and sovereignty, is the Sovereign of this country through the government". But what is the position if the Secretary of State, while ready to supply much useful information as to the degree of recognition accorded by His Majesty's Government, declares that the question of the status of the foreign authority is not a question of fact but a question of law to be determined by the court in the light of the information given? This is what actually happened in *Banco de Bilbao* v. *Rey* and in *The Arantzazu Mendi*, where the closing passage in the reply of the Foreign Office was as follows: "The question whether the Nationalist Government is to be regarded as that of a foreign sovereign state appears to be a question of law to be answered in the light of the preceding statements and having regard to the particular issue with respect to which the question is raised."

It is difficult to be positive in the criticism of the passage just quoted. Whether a community possesses a sufficient degree—and permanence—of independence so as to acquire the status of a sovereign community in international law is a mixed question of fact and law (it is, of course, clear that the question of the *consequences* resulting from its sovereign status, if any, is a pure question of law). But in so far as it is a question of law, the practice has been to leave the determination of that matter to the Crown—just as courts have been content to rely on the statement of the Crown as to whether certain facts constitute in law a state of war between this country and a foreign state. In matters of status that question of law—or of fact and law—has, as a rule, been reduced to the question whether His Majesty's Government has granted the necessary degree of recognition to the foreign community. There is no rule of law which compels the Secretary of State to answer the question put before him. The principle of the conclusiveness of the statements of the Crown in these matters is merely a rule of evidence;[2] courts avail themselves, in a conclusive manner, of the best evidence obtainable. As Lord Sumner said in *Duff Development Company* v. *The Government of Kelantan*, it is conceivable that the Crown may decline to answer the inquiry, "as in changing and difficult times policy might require it to do".[3] The Secretary of State did so in *Banco de Bilbao* v. *Rey* and in *The Arantzazu Mendi*. It may be a matter of dispute whether the reason given (namely, that the crucial question was one of law) will commend itself to every one. But seeing that he did refuse to give an answer, the further question arises whether the court in giving its own answer may, in case of doubt, have recourse to sources of evidence other than the facts enumerated in the letter from the Foreign Office, for instance, to the replies given by His Majesty's Ministers in both Houses of Parliament? It is arguable that while the court must not disregard the information received from the Crown, if that information is insufficient or obscure it may properly be supplemented from other sources. To quote Lord Sumner once more: "The court might be entitled to accept secondary evidence in default of the best."[4] The principle of the conclusiveness of the statements of the Crown can apply only so long as these statements are intended to be conclusive in the sense that they are meant to supply a full answer to the inquiry put by the court or by the parties. But when there is no such intention, the statement, while conclusive of the facts which it recites, is not exclusive of other sources of evidence. Otherwise, there is a danger that a "temporary if not temporizing"[1] answer may be made a starting-point for a purely logical interpretation in disregard of the realities of the situation and of the principles of international law.

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[1] [1921] 3 K.B. 456.

[2] See Bankes L.J. in *The Gagara*, [1919] P. 95, quoting Kay L.J. in *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B.D. 149.

[3] [1924] A.C. 797, 824.

[4] *Ibid.* In *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B.D. 149, Lord Esher M.R. disapproved of the course taken by Sir Robert Phillimore in *The Charkieh* (L.R. 4 A. & E. 59) in so far as he resorted to sources other than the communication of the Foreign

H. LAUTERPACHT.

THE CONVENTION CONCERNING STATISTICS OF WAGES AND HOURS OF WORK, 1938

IN the course of its twenty-fourth session, held at Geneva in 1938, the International Labour Conference adopted the sixty-third international labour convention—the Convention concerning Statistics of Wages and Hours of Work, 1938.[2] Each Member of the International Labour Organization which ratifies this convention undertakes: (*a*) that it will compile as required by the convention statistics relating to wages and hours of work; (*b*) that it will publish the data compiled in pursuance of the convention as promptly as possible and will endeavour to publish data collected at quarterly (or more frequent) intervals during the succeeding quarter and to publish data collected at intervals of six or twelve months during the succeeding six or twelve months respectively; and (*c*) that it will communicate the data compiled in pursuance of the convention to the International Labour Office at the earliest possible date (Article 1). The statistics to be compiled relate to: (*a*) average earnings and hours actually worked in mining and manufacturing industries (Part II of the convention); (*b*) time rates of wages and normal hours of work in mining and manufacturing industries (Part III of the convention); and (*c*) wages and hours in agriculture (Part IV of the convention).

The exact statistical particulars to be compiled (Articles 5–22 of the convention) are of no special interest to international lawyers. The convention has, however, three features of legal interest:

1. The convention contemplates the possibility of partial ratification. The view taken when it was drafted was that, while it is desirable that Members ratifying should compile both statistics of average earnings and of hours actually worked and statistics of time rates of wages and of normal hours of work, and while failing both sets of statistics it is preferable that they should compile statistics of average earnings and of hours actually worked, it should none the less be possible for Members to become parties to the convention if they are prepared to compile either of these sets of statistics in accordance with its provisions.

Office. However, in that case the answer of the Foreign Office purported to be exhaustive. See also *White, Child & Beney Limited* v. *Simmons*, [1922] 38 T.L.R. 357; 38 T.L.R. 616, for an example of a refusal of the Foreign Office to supply information on a question of fact, namely, the date to which the recognition of the Government of Soviet Russia should be deemed to be retrospective.

[1] *Per* Lord Sumner, *ibid.*

[2] The text of the convention has been published in International Labour Office, *Official Bulletin*, Vol. XXII, No. 3, pp. 75–84.

There was therefore included in the convention a provision that any Member may, by a declaration appended to its ratification, exclude from its acceptance either the part relating to statistics of average earnings and of hours actually worked (Part II) or the part relating to statistics of time rates of wages and of normal hours of work (Part III), and may exclude the part relating to agricultural statistics (Part IV) either alone or together with either Part II or Part III. The preamble, however, indicates a preference for the application of Part II. Furthermore the exclusion of a part from acceptance by a declaration annexed to ratification is not necessarily final. Any Member which has made such a declaration may at any time cancel it by a subsequent declaration, and every Member for which a declaration excluding a part of the convention from its acceptance is in force is to indicate each year in its annual report on the application of the convention, submitted under Article 22 of the Constitution of the International Labour Organization, the extent to which any progress has been made with a view to the application of the part or parts of the convention excluded from its acceptance.

2. The convention includes a provision permitting certain Members to exclude certain areas from its application. There is a well-established rule that reservations to international labour conventions are inadmissible, and this rule is regarded as applying to geographical reservations in respect of a part of the metropolitan territory of a Member in the same manner as to reservations relating to particular provisions of a convention. There is apparently an exception to this rule as regards the Indian States, based on peculiar historical considerations and sanctioned by general acquiescence, but otherwise it appears to be a strict one and is based upon important considerations of policy. In the case of certain Members, however, the application of the provisions of conventions throughout their territory presents great difficulties, and it has been thought desirable to facilitate ratification by giving a limited power to exclude certain areas from the application of certain conventions. This was first done in the Sickness Insurance (Industry, &c.) Convention, 1927 (Article 10), and the Sickness Insurance (Agriculture) Convention, 1927 (Article 9); it was done again in the Safety Provisions (Building) Convention, 1937; and a similar provision has now been included in the Convention concerning Statistics of Wages and Hours of Work (Article 23). The procedure laid down by this convention for taking advantage of the power to exclude areas is of interest. The power is limited to Members "the territory of which includes large areas in respect of which, by reason of the difficulty of creating the necessary administrative organization and the sparseness of the population or the stage of economic development of the area, it is impracticable to compile statistics complying with the requirements" of the convention. Any Member which proposes to exclude such areas from the application of the convention in whole or in part is to indicate in its first annual report on the application of the convention any areas in respect of which it proposes to have recourse to the power to exclude them. No Member is to be entitled, after the date of its first annual report, to exercise this power except in respect of areas so indicated. Each Member which has indicated its intention of exercising the power of exclusion is to indicate in subsequent annual reports any areas in respect of which it renounces the right to have recourse to that power.

3. The convention lays down a procedure for the future improvement and amplification of the statistics compiled in accordance with its provisions. In so doing it does not break completely new ground. The International Convention

Relating to Economic Statistics[1] provided for the appointment by the Council of the League of Nations, acting in co-operation with representatives of states not Members of the League which are parties to the convention, of a Committee of Technical Experts.[2] This committee is entrusted with specific functions under the convention and its annexes, notably the amicable settlement of disputes,[3] and the consideration of a number of technical questions arising in connexion with the application of the provisions of the annexes.[4] It is also empowered, however, to make "any suggestions which appear to it useful, for the purpose of improving or amplifying the principles and arrangements laid down in the convention concerning the classes of statistics dealt with therein" and to make "suggestions in regard to other classes of statistics of a similar character in respect of which it appears desirable and practicable to secure international uniformity", and it is required to "examine all suggestions to the same end which may be submitted to it by the governments of any of the High Contracting Parties". It may not make any suggestions in respect of statistics relating to public or private finance, and a particularly interesting limitation upon its competence is that it may not "without the previous agreement of the appropriate international institutions or organizations" make any suggestions in respect of statistics relating to agriculture, labour, or transport.[5] Suggestions made by the committee remain suggestions and have no precise legal effect. In the Convention concerning Statistics of Wages and Hours of Work an attempt has been made to achieve a similar result in a rather different way. It was not thought desirable to create by the convention itself any special expert body to advise upon the improvement and amplification of the statistics compiled in pursuance of it. A certain flexibility as regards the composition of expert bodies is often practically convenient, and the modification of the provisions of an international convention is a cumbersome process. Moreover, the necessity for creating such a body was much reduced by the possibility of attributing powers in this connexion to the Governing Body of the International Labour Office. There was therefore included, in lieu of the creation by the convention of a special expert body, a provision that "the Governing Body of the International Labour Office may, after taking such technical advice as it may deem appropriate, communicate to the Members of the Organization proposals for improving and amplifying the statistics compiled in pursuance of this convention or for promoting their comparability" (Article 24 (1)). It seemed difficult to include in the convention a provision that such proposals shall be binding upon Members of the Organization, but it nevertheless appeared desirable to give such proposals a higher status than that of mere suggestions. The convention therefore prescribes obligations in respect to them which are analogous to the obligations prescribed by the Constitution of the International Labour Organization (Article 19) in regard to draft conventions and recommendations adopted by the International Labour Conference. Each Member ratifying the convention undertakes that it will "(*a*) submit for the consideration of its competent statistical authority any such proposals communicated to it by the Governing Body, and (*b*) indicate in its annual report on the application of conventions the extent to which it has given effect to such proposals" (Article 24 (2)). The existence of a similar obligation under the Constitution of the International Labour Organization has done much to stimulate the ratification of international labour conventions, and it is anticipated that this provision will contribute to securing the widespread acceptance of proposals for improving and amplifying the statistics compiled in pursuance of the convention which the Governing Body has decided to communicate to Members of the Organization.

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[1] Hudson, *International Legislation*, Vol. IV, p. 2575.

[2] Article 8, *ibid.*, at p. 2583.

[3] Article 10 of the convention, *ibid.*, at p. 2585.

[4] e.g. Annex I, Part I, 6, *ibid.*, at p. 2596, and Part III, 7 and 8, *ibid.*, at p. 2611; Annex III, Part I (2b), *ibid.*, at p. 2612, Part II B 2, *ibid.*, at p. 2614, and D I, *ibid.*, at pp. 2615–6.

[5] Article 8 (2), *ibid.*, at p. 2584.

C. W. Jenks.

ADJOURNMENT OF SESSIONS OF THE ASSEMBLY OF THE LEAGUE OF NATIONS

The continuity of different sessions of the Assembly of the League of Nations is a matter which is sometimes discussed in commentaries on the League Covenant.[1] It is of course now generally accepted that each annual Assembly is not constitutionally different from the others which have preceded it, but that they all represent different sessions of a single organ.

Quite recently a practice has grown up of adjourning sessions of the annual Assembly, a practice which may perhaps call for an amendment of the Rules of Procedure.

On September 28, 1935, the Assembly decided "in view of the present political circumstances (the dispute between Italy and Ethiopia), to adjourn, and not to close its session", so that it could easily be summoned if necessary.[2] Again on October 11, 1935, the Assembly adjourned, being of opinion that "the circumstances which had led us to decide not to close the sixteenth session of the Assembly still exist".[3] The president of the Assembly declared "the session adjourned and the meeting closed".[4] When the Assembly resumed its work on June 30, 1936, Professor Bourquin, *rapporteur* of the Credentials Committee, made the following statement:

> "The present meeting is only a continuation of the ordinary session of the Assembly, of which the work was simply suspended. In these circumstances, the Committee on Credentials . . . had only to deal with the changes that have been made in the composition of some of the delegations."[5]

This report was adopted without discussion and the session of the Assembly duly closed some days later.

For somewhat similar reasons the Assembly was induced to adjourn its Eighteenth Ordinary Session on October 6, 1937, and to authorize its president to summon a further meeting if the Advisory Committee on the Far East should so request.[6] Unlike the previous Assembly (Sixteenth Ordinary Session), however, no further meeting was held and the Eighteenth Ordinary Session was never formally closed. It might therefore be argued that the Nineteenth Ordinary Session of 1938 was in reality but a continuation of the 1937 Session, and constituted nothing other than the Eighteenth Ordinary Session, just as the meetings held in July 1936 were only a continuation of the Ordinary Session of 1935 and were considered as belonging legally to the Sixteenth Session. The same practice was adopted in the case of the Nineteenth Ordinary Session of the Assembly which was again only adjourned but not formally closed, in view of the general political situation arising out of the Czechoslovak crisis.[1]

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[1] For example see Ray, *Commentaire du Pacte de la Société des Nations*, 1930, pp. 155–7.

[2] League of Nations, *Official Journal*, Special Supplement, No. 138, p. 95; cf. also *ibid.*, p. 98.

[3] *Ibid.*, p. 115.

[4] *Loc. cit.*

[5] *Ibid.*, Special Supplement, No. 151, p. 18.

[6] Cf. *ibid.*, Special Supplement, No. 169, pp. 125, 149.

The omission to declare a formal closure of the Eighteenth Session of the Assembly may be explained by the fact that Article 1, paragraph 1, of the Rules of Procedure provides for a regular general session of the Assembly every year in September. Consequently, the opening of a new session may be regarded as automatically closing the previous session still in a condition of adjournment. Apart from doubts which may subsist as to the legal certainty of the position, it seems, at all events, that the procedure adopted at the last two sessions, coupled with the absence of formal closure, is somewhat inelegant. All that would be necessary to resolve the matter would be either in each case an explicit authorization for the acting president of the Council to declare the session closed before the opening of the next session, or generally an amendment to the Rules of Procedure declaring that where the session has been adjourned but not formally closed it shall be deemed to have been formally closed on the day before the opening of the regular session in September.

S. Engel.

THE INTERPRETATION OF INTERNATIONAL LABOUR CONVENTIONS BY THE INTERNATIONAL LABOUR OFFICE

In view of the scale upon which international labour conventions have been adopted and ratified in the last twenty years,[2] it is not surprising that questions should frequently have arisen as to the interpretation of the provisions of these conventions. The Constitution of the International Labour Organization provides that "Any question or dispute relating to the interpretation . . . of any . . . convention . . . shall be referred for decision to the Permanent Court of International Justice",[3] but only one case relating to the interpretation of a convention[4] has in fact been submitted to the Permanent Court. It would seem that the reason why cases have not been submitted to the Court more frequently is that they can come before the Court only when (*a*) one or more states institute proceedings against another state or states, with a view to obtaining an interpretation of a convention, or (*b*) a request for an advisory opinion is submitted to the Court through the Council or Assembly of the League of Nations. The International Labour Office has consistently taken the view[5] that the effect of Article 35 of the Constitution of the Organization is to place upon the Council a duty to transmit to the Court any request for an advisory opinion made by the Governing Body. Recourse to the Court has continued, however, to be regarded as a last resort, and only the one case referred to above has actually been submitted to it.

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[1] Cf. League of Nations, *Official Journal*, Special Supplement, No. 183, p. 100.

[2] Sixty-three conventions were adopted at the first 24 sessions of the International Labour Conference held during the period 1919–38. On Dec. 31, 1938, 44 of these conventions had come into force and a further 5 had received the ratifications necessary to bring them into force during 1939. On the same date 836 ratifications had been registered on behalf of 49 different states.

[3] Article 37.

[4] The case relating to the Interpretation of the Convention of 1919 concerning Employment of Women during the Night, *P.C.I.J.*, Series A/B, No. 50.

[5] *Committee of Jurists on the Statute of the Permanent Court of International Justice, Minutes*, League of Nations Document C. 166, M. 66, 1929, V, at pp. 102–4; *Minutes of the 51st Session of the Governing Body of the International Labour Office*, at pp. 117–21; *League of Nations Official Journal*, 18th year, No. 2, Feb. 1937, at pp. 184–5.

In these circumstances it has become not uncommon for governments which are in doubt as to the meaning of a convention to ask the International Labour Office for its opinion on the subject. The International Labour Office has considered it to be its duty to assist governments in this manner, but has always pointed out that it has no special authority to interpret the texts of conventions and that the Permanent Court alone is competent to give an authentic interpretation. The practice of requesting the Office for its opinion has, however, developed to the point at which there is a considerable "*jurisprudence*" of Office opinions upon disputed points of interpretation. When these opinions are of any general interest they are submitted to the Governing Body and are published. As an indication of the importance which such opinions have now assumed, it may be mentioned that thirty-six opinions had been published prior to December 31, 1938. None of these opinions has been challenged by any Member of the Organization. It is believed that their general status and value are accurately described in a memorandum submitted to the Governing Body by the International Labour Office as long ago as October 1921. In that memorandum it was stated that:

> "More recently it has happened that the same point of interpretation has been raised by more than one Member of the Organization. In these cases the Office has been able to point out that when the point was previously raised and it was consulted thereon, the information supplied by it and the conclusion to which it appeared to lead had been accepted by the Member in question and had given rise to no objection after publication in the *Official Bulletin*. The process of the development of international law is, in fact, an exactly similar process, and the tacit acceptance of an interpretation acted on by a Member and communicated through the *Official Bulletin* constitutes important authority which can always be invoked for that interpretation."[1]

A higher degree of authority has recently been claimed for these opinions in one very special type of case. In an opinion given by the Office in 1938 in reply to a request made on behalf of the Swedish Government there occurs the passage,

> "Further, although the Constitution of the International Labour Organization does not confer upon the International Labour Office any special authority to interpret the texts of conventions adopted by the International Labour Conference, it would seem that, when an opinion given by the Office has been submitted to the Governing Body and published in the *Official Bulletin* and has met with no adverse comment, the Conference must, in the event of its subsequently including in another convention a provision identical with or equivalent to the provision which has been interpreted by the Office, be presumed, in the absence of any evidence to the contrary, to have intended that provision to be understood in the manner in which the Office has interpreted it."[2]

Suggestions have been made at various times that the Governing Body[3] or the Committee of Experts on the Application of Conventions[4] should, subject to the ultimate authority of the Permanent Court, be entrusted with the interpretation of conventions in cases of importance, but the Governing Body has preferred that this interpretative function should continue to be discharged by the Office.

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[1] *Minutes of the Ninth Session of the Governing Body of the International Labour Office*, pp. 365–6.

[2] International Labour Office, *Official Bulletin*, Vol. XXIII, No. 1, p. 32.

[3] See *Minutes of the Ninth Session of the Governing Body of the International Labour Office*, at pp. 307–15, 320, and 363–9.

[4] See particularly *Minutes of the Fifty-first Session of the Governing Body of the International Labour Office*, at pp. 42–7 and 121; and *Minutes of the Fifty-seventh Session of the Governing Body of the International Labour Office*, at pp. 210–11 and 344–5.

It may be of interest to summarize some of the opinions given by the International Labour Office in accordance with this procedure. Those summarized below are merely a selection intended to illustrate the manner in which the Office has attempted to discharge its function as an interpretative agency:

1. *The Calculation of the Commencement of Liability under the Workmen's Compensation (Accidents) Convention, 1925.*

Article 6 of the Workmen's Compensation (Accidents) Convention, 1925, is as follows:

> "In case of incapacity, compensation shall be paid not later than as from the fifth day after the accident, whether it be payable by the employer, the accident insurance institution, or the sickness insurance institution concerned."

The International Labour Office was asked on behalf of the Swedish Government whether this article should be interpreted as meaning that compensation is due (1) as from the fifth day after the accident, the day of the accident not included, or (2) as from the sixth day after the accident, the day of the accident not included, or (3) as from the fifth day after the accident, the day of the accident included. On August 12, 1930, the International Labour Office advised: A. That the second suggested interpretation must in any case be excluded as it was not consistent with either the English or the French text, both of which state clearly that compensation shall be granted "not later than as from the fifth day after the accident". B. That although the preparatory work furnishes no answer to the question as to whether the actual day of the accident should be included in the calculation of the maximum period of five days allowed by Article 6, and although it would therefore be in accordance with the principles for the interpretation of international conventions to interpret the article in the sense placing the least obligation on states (i.e. in the sense that compensation would be payable as from the fifth day after the accident, the day of the accident not included), such an interpretation would "go too far" since the words "not later than" showed that the Conference considered a period of five days as a maximum which it was undesirable to reach and this interval was in fact particularly long when compared with the periods laid down in national legislation.[1] Sweden had ratified the convention (before this interpretation was given) on September 8, 1926. On December 31, 1938, the convention had been ratified by 19 states.

2. "*Special Arrangements*" *under the Equality of Treatment* (*Accident Compensation*) *Convention, 1925.*

Article 1 of the Equality of Treatment (Accident Compensation) Convention, 1925, provides as follows:

> "1. Each Member of the International Labour Organization which ratifies this Convention undertakes to grant to the nationals of any other Member which shall have ratified the Convention, who suffer personal injury due to industrial accidents happening in its territory, or to their dependants, the same treatment in respect of workmen's compensation as it grants to its own nationals. 2. This equality of treatment shall be guaranteed to foreign workers and their dependants without any condition as to resi-

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[1] International Labour Office, *Official Bulletin*, Vol. XV, No. 4, p. 150.

dence. With regard to the payments which a Member or its national would have to make outside that Member's territory in the application of this principle, the measures to be adopted shall be regulated, if necessary, by special arrangements between the Members concerned."

The International Labour Office was asked on behalf of the Czechoslovak Government whether they were justified in taking the view that the last sentence of the above paragraph refers only to the *technical method* of making the payments which a Member or its nationals would have to make outside that Member's territory and does not imply that any convention or "special arrangement" is necessary in order that (i) foreign workers who suffer personal injury due to industrial accidents and who have left the country in which the accident occurred in order to reside in another country, and (ii) their dependants who do not reside in the country in which the accident occurred, *shall be entitled* to the same treatment in respect of workmen's compensation as is granted to the nationals of the Member concerned. On November 5, 1927, the International Labour Office advised: A. That "the first paragraph of Article 1 of the Convention, without mentioning any condition, requires that equality of treatment as regards workmen's compensation for accidents should be granted to the nationals of the other states which have ratified the convention. To avoid any misunderstanding of the scope of this obligation, the first phrase of the second paragraph states that even the place of residence of foreign workers or their dependants may not be invoked as limiting the obligation. The requirement is therefore positive and involves no further formality; it is a direct undertaking of each state which has ratified the convention". B. That in the light of the preparatory work it was "perfectly clear that the only object of the arrangements to which the second paragraph of Article 1 refers is to deal with difficulties which might possibly arise in the transfer of funds from one country to another. The obligation to apply the principle of equality of treatment to victims of accidents who have left the country in which the accident occurred, as well as to their dependants, arises directly out of ratification of the convention and is in no way conditional upon the conclusion of the conventions or special arrangements provided for by the second paragraph of Article 1."[1] Czechoslovakia had ratified the convention on February 18, 1927, before requesting this opinion. On December 31, 1938, the convention had been ratified by 35 states.

3. *The Association of Employers and Workers with Minimum Wage-fixing Machinery under the Minimum Wage-fixing Machinery Convention, 1928.*

Article 3 of the Minimum Wage-fixing Machinery Convention, 1928, is in part as follows:

> "(2) The employers and workers concerned shall be associated in the operation of the machinery, in such manner and to such extent, but in any case in equal numbers and on equal terms, as may be determined by national laws or regulations."

In South Africa there was statutory power for the Minister to appoint additional members of the Wage Board equally representative of employers and employees concerned in a particular investigation, but it was not customary to exercise this power. The International Labour Office was asked on behalf of the South African Government "whether the use of the words 'in such manner and to such extent' recognizes the legislative authority exercised only at the option of the Minister".

[1] *Ibid.*, Vol. XIII, No. 1, p. 24.

On March 12, 1929, the International Labour Office advised: A. That the use of the words "shall be associated" implies a definite obligation to associate the employers and workers in the operation of the wage-fixing machinery. The manner and extent of the association of the employers and workers in the operation of the machinery is left to national laws and regulations to determine, but it is provided that it shall in any case be "in equal numbers and on equal terms". B. That the absence of provisions in the South African Act rendering compulsory the association of employers and workers in the operation of the Wage Board was not in itself an obstacle to ratification, but that if the convention were ratified it would be necessary for the Minister to exercise his power to appoint additional members representing employers and workers in all cases in which their appointment would appropriately fulfil the purposes of Article 3 (2). C. That if in the special circumstances of South Africa it would be impossible in some cases to associate employers and workers in the operation of the Wage Board, or if such association would only be possible in the form of consultation, it would not be contrary to legal principle, the spirit of the convention, or the intention indicated by the preparatory work, for the Minister to decide in such cases not to exercise his power to appoint additional members.[1] South Africa ratified the convention on December 28, 1931. On December 31, 1938, the convention had been ratified by 22 states.

4. *The Obligations of Inland Countries under the Marking of Weight (Packages transported by Vessels) Convention, 1929.*

Article 1 of the Marking of Weight (Packages transported by Vessels) Convention, 1929, is in part as follows:

> "1. Any package or object of one thousand kilograms (one metric ton) or more gross weight consigned within the territory of any Member which ratifies this convention for transport by sea or inland waterway shall have had its gross weight plainly and durably marked upon it on the outside before it is loaded on a ship or vessel. . . . 3. The obligation to see that this requirement is observed shall rest solely upon the government of the country from which the package or object is consigned, and not on the government of a country through which it passes on the way to its destination."

The International Labour Office was asked on behalf of the Swiss Government whether "the country from which the package or object is consigned" is "the country in which the package is originally consigned for transport, as is the case for Switzerland, by railway and for subsequent loading on a ship for transport by sea", or is "only the country in which the package is loaded on a ship for transport by sea"? On August 21, 1930, the International Labour Office advised: A. That "Since the obligation to mark the weight on the package dates from the moment that it is consigned, if it is intended for transport by vessel, it is clear that this obligation can be assumed only by the state in the territory of which the consignment is made. . . . If the Conference had wished to refer only to the country in which the package is loaded on board ship it would have made that clear and would have avoided saying 'any package . . . consigned within the territory of any Member . . .'." Further, since "the article excludes 'a country through which it (the package) passes on the way to its destination', it is clear that the obligation to see that the weight is marked upon the package does in fact rest upon the country which consigns it by railway, when the package is transported by rail before being loaded on a ship". B. That the above interpretation was confirmed by the preparatory work and particularly by a declaration of the German Government Delegate that he regretted that responsibility had not been placed "on the country in which the package or object is to be loaded on board ship"[1] Switzerland ratified the Convention on November 8, 1934. On December 31, 1938, the convention had been ratified by 35 states.

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[1] International Labour Office, *Official Bulletin*, Vol. XIV, No. 2, p. 64.

5. *The Application to Free Ports of the Marking of Weight* (*Packages transported by Vessels*) *Convention, 1929.*

This case related to the same article of the convention as the preceding case. The International Labour Office was asked on behalf of the Danish Government whether, in the case of a package consigned to the free port of Copenhagen to be warehoused in the port and reconsigned thence, there would be an obligation upon the Danish authorities to check the marking of the weight and to ensure marking in the case of packages not already marked. On August 7, 1931, the International Labour Office advised: A. That "since the convention refers only to packages or objects consigned for transport by sea or inland waterway, the government of the state from which the package or object is consigned is able to fulfil its obligation only if the final destination of the package or object—and in particular the fact that they are to be transported by sea or inland waterway—is known at the time of the consignment" with the result that a distinction must be drawn between (i) cases in which the consigning party knows the final destination of the package and knows that it is to be transported by water, and (ii) cases in which the consigning party only knows the immediate destination of the package and this does not involve transport by water. B. That it follows from the above that, when a package is consigned with a single bill of lading which covers the whole journey from the place of original consignment to the port of final destination, the authorities of a free port in which the package remains for a time have no responsibility as regards it, since any responsibility of a country through which a package passes is formally excluded by the convention. C. That where a package is consigned by a first bill of lading to a free port and is thence reconsigned by a new bill of lading to another port, it is for the authorities of the free port to see that the weight is marked on the package since it must be presumed (i) that, for the consignor, the place of destination of the package is that shown on the first bill of lading, and (ii) that the consignor is not aware of the final destination of the package and cannot take it for granted that it will be reconsigned by water beyond the free port. D. That where there are two bills of lading the authorities of the free port are under an obligation to see that the weight is marked in the case of packages coming to the free port from a country which has not ratified the convention. E. That where the weight is already marked on a package when it reaches a free port, the authorities of the free port are not required to check the accuracy of the marking since, as the party responsible for the first bill of lading has considered itself responsible for fulfilling the obligation imposed by the convention, the party responsible for the second bill of lading can consider itself in principle free from any obligation.[2] Denmark ratified the convention on January 18, 1933, conditionally upon other ratifications which had not yet been registered on December 31, 1938, on which date the convention had been ratified by 35 states.

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[1] *Ibid.*, Vol. XV, No. 4, p. 153.

[2] *Ibid.*, Vol. XVII, No. 1, p. 45.

6. *The Saving for Higher Standards in the Hours of Work (Commerce and Offices) Convention, 1930.*

Article 10 of the Hours of Work (Commerce and Offices) Convention, 1930, is as follows:

> "1. Nothing in this Convention shall affect any custom or agreement whereby shorter hours are worked or higher rates of remuneration are paid than those provided by this convention. 2. Any restrictions imposed by this convention shall be in addition to and not in derogation of any other restrictions imposed by any law, order or regulation which fixes a lower maximum number of hours of employment or a higher rate of remuneration than those provided by this convention."

In answer to inquiries made on behalf of the Polish Government the International Labour Office advised as follows on May 21, 1931: A. That paragraph 1 of the article merely lays down that customs or agreements more favourable to the workers than the system set up by the convention shall not be affected by the convention and does not involve any obligation necessarily to maintain such customs or agreements. B. That although the second paragraph appears to involve an obligation not to modify more favourable legislation, such an interpretation is not imposed absolutely by the text and would have results which do not appear to be in accordance with the intentions of the Conference. Such a solution "would result in placing upon the state ratifying the convention two very different kinds of obligation: on the one hand, the special obligations for which the convention definitely provides and which consist of setting up the system which it defines; on the other hand, a general and vague obligation to maintain any system in force previous to the ratification of the convention which provides shorter hours of work or a higher rate of remuneration. It should be noted that the application of the latter obligation would be impossible to supervise in practice and that it would be of such an uncertain nature that a state desirous of fulfilling its undertakings would hesitate to submit to it. It is unlikely in any case, that when the Conference adopted the second paragraph . . . it intended this provision to have such important effects. It is certain that a clause involving such serious consequences would not have been adopted without considerable and explicit debate, and this was not the case. On the contrary, the discussion in the Conference on this point was relatively short and the statement made on the subject by the actual author of the text of Article 10, Mr. Hallsworth, seems to make it clear that this provision has not the absolute meaning which might perhaps be deduced on a first reading from its grammatical construction." The second paragraph should therefore be interpreted in such a way as not to impose upon states an obligation to maintain conditions of labour superior to those for which the convention explicitly provides. C. That Article 10 as a whole must therefore be interpreted not as involving a "positive obligation to maintain systems setting up shorter hours of work or higher rates of pay than those fixed by the convention" but simply as a safeguarding clause similar in effect to Article 19 (11) of the Constitution of the Organization.[1] On December 31, 1938, Poland had not ratified this convention which had then been ratified by 10 states.

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[1] International Labour Office, *Official Bulletin*, Vol. XVII, No. 1, p. 48.

7. *The Application to the Employees of Public Postal Services of the Hours of Work (Commerce and Offices) Convention, 1930.*

Article 1 of the Hours of Work (Commerce and Offices) Convention, 1930, is in part as follows:

> "1. This convention shall apply to persons employed in the following establishments, whether public or private: (*a*) commercial or trading establishments, including postal, telegraph and telephone service. . . . 3. It shall be open to the competent authority in each country to exempt from the application of the convention: (*b*) offices in which the staff is engaged in connection with the administration of public authority."

The German Government took the view that there is a distinction of principle between officials on the one hand and workers subject to the rules of private law on the other hand. In their view it followed from this distinction that officials should be deemed to be neither workers nor non-manual workers nor salaried workers, with the result that international conventions covering manual and non-manual workers did not apply to civil servants. In view of this general theory the German Government regarded the inclusion of the above provision in the convention as unnecessary. If this view were not accepted the German Government regarded the provision quoted as permitting the exemption of all staff employed by public administrative bodies. It asked the International Labour Office for its opinion and on August 29, 1932, the Office advised: A. That the general question of the applicability of international labour conventions to officials "has already been settled in fact in the affirmative". A number of conventions contain provisions which make them applicable "to any *public or private* industrial undertaking or *any* branch thereof". The Hours of Work (Industry) Convention, 1919, for instance, applies to public transport undertakings. "No distinction is made between persons employed in those undertakings according to the legal nature of the rules governing their conditions of service. The convention therefore applies to these persons even if, according to the public law of certain states, they have the status of officials." Numerous other conventions contain similar provisions and "in the maritime conventions, for example, it is expressly stated that they apply to certain state undertakings and not to others. In these conditions it can scarcely be admitted that an international labour convention *a priori* does not apply to officials. The question, in the opinion of the Office, can only be settled in the light of the terms of the convention". B. That in the particular case of the Hours of Work (Commerce and Offices) Convention the test to be applied to distinguish, within the meaning of the convention, the members of the public administration services who are engaged in the administration of public authority from those who are not so engaged does not, as the German Government had suggested, lie in the legal nature of the rules governing their conditions of service, the first having a legal status in public law and the second having a contract of engagement under private law, but in the nature of the duties performed. The question is not whether a person is an "official" or an "employee", but whether he or she is or is not competent to take part in the action required to secure compulsory obedience to the orders of the state. The French text, which refers to "les administrations publiques dans lesquelles le personnel employé agit comme organe de la puissance publique", is quite clear. The English text was drawn up on the basis of the French text and though it is not a literal translation the words used were used to convey as exactly as possible the meaning of the French text. The interpretation suggested by the German

Government would allow governments to exclude from the scope of the convention almost the whole of the staff employed in the postal, telegraph, and telephone services, which would be in obvious contradiction to the intention clearly expressed by the Conference in paragraph 1 (*a*) of Article 1, and also indicated by the preparatory work.[1] The German Government did not ratify the convention. On December 31, 1938, the convention had been ratified by 10 states.

8. *The Increase of Holidays with Length of Service under the Holidays with Pay Convention, 1936.*

Article 2 of the Holidays with Pay Convention, 1936, is in part as follows:

> "1. Every person to whom this convention applies shall be entitled after one year of continuous service to an annual holiday with pay of at least six working days. 5. The duration of the annual holiday with pay shall increase with the length of service under conditions to be prescribed by national laws or regulations."

The International Labour Office was asked on behalf of the Danish Government whether an increase of holiday with length of service is required by the convention when the length of holiday due after one year's service is fixed by national law not at six but at twelve days. On October 17, 1938, the International Labour Office advised: A. That the provision relating to the increase in the holiday and that concerning the minimum duration of the holiday must be considered in relation to each other. B. That as a state which accorded six days after one year's service and increased this duration progressively to a maximum of twelve days would be correctly observing the convention, *a fortiori* a state allowing twelve days after one year's service must be regarded as going beyond the obligations of the convention and consequently as complying with it.[2] On December 31, 1938, Denmark had not yet ratified the convention. It had then been ratified by 2 states.

9. *The Saving for Higher Standards in the Hours of Work and Manning (Sea) Convention, 1936.*

Article 20 of the Hours of Work and Manning (Sea) Convention, 1936, is as follows:

> "Nothing in this convention shall affect any law, award, custom or agreement between shipowners and seamen which ensures more favourable conditions than those provided by this convention."

The International Labour Office was asked on behalf of the Swedish Government whether this article imposes an obligation to maintain standards higher than those prescribed by the convention in cases in which such standards are operative at the time when the convention comes into force, or whether it is simply a recital that the convention embodies minimum requirements. The International Labour Office advised: A. That as the question was substantially the same as that submitted for an opinion in 1931 by the Polish Government with reference to Article 10 of the Hours of Work (Commerce and Offices) Convention, 1930, the reasoning relied upon by the International Labour Office in that case (case No. 6 above) appeared to be equally applicable to the new case. It was in this connexion that the Office expressed the view that when a published Office opinion has met with no adverse comment, the Conference must, in the event of its subsequently including in another convention a provision identical with or equivalent to the provision which has been interpreted by the Office, be presumed, in the absence of any evidence to the contrary, to have intended that provision to be understood in the manner in which the Office has interpreted it. B. That a provision that a convention does not affect a custom or agreement clearly cannot be construed as creating an obligation to alter completely the very nature of the custom or agreement by making the state responsible for ensuring that it is maintained; and that it is almost equally unreasonable to regard a provision that a law shall not be affected by the convention as creating a positive obligation to maintain that law in force. C. That drafting changes made at a later session of the Conference with a view to clarifying the meaning of a provision originally submitted to the Conference in a form identical with Article 20 of the Hours of Work and Manning (Sea) Convention, can, in view of the fact that they "were certainly not regarded as involving any change of substance", be regarded "as stating the intended effect of Article 20 of the Hours of Work and Manning (Sea) Convention" and make it clear that that article "does not create any obligation to maintain existing standards in so far as they are higher than the standard set by the convention; it simply emphasizes the general principle asserted by the Constitution of the Organization that there is no obligation under any international labour convention to lower existing higher standards to the convention level, and it thereby rebuts any presumption which might otherwise arise under the law of certain countries that ratification of a convention is intended to abrogate existing more favourable arrangements".[1] On December 31, 1938, Sweden had not yet ratified the convention. It had then been ratified by 3 states.

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[1] International Labour Office, *Official Bulletin*, Vol. XVII, No. 3, p. 117.

[2] *Ibid.*, Vol. XXIII, No. 4, p. 123.

10. *The Meaning of the Term "Competent Person" in the Safety Provisions (Building) Convention, 1937.*

Article 7 (7) of the Safety Provisions (Building) Convention, 1937, is as follows: "Scaffolds shall be periodically inspected by a competent person." The International Labour Office was asked on behalf of the Egyptian Government whether by competent person was meant a servant of the employer or a public official. On July 30, 1938, the International Labour Office advised: A. That as the convention does not define the expression "competent person" inspection may be entrusted either to public officials or to persons designated by the employer, subject in both cases to the condition of competence laid down by the convention being complied with. B. That normally the periodical inspection of scaffolds will most frequently be left to the employer, who will designate either one of his qualified employees or an expert to effect such inspection.[2] On December 31, 1938, no ratifications of the convention had yet been received.

C. W. Jenks.

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[1] *Ibid.*, No. 1, p. 30.

[2] *Ibid.*, No. 4, p. 122.

DECISIONS, OPINIONS, AND AWARDS OF INTERNATIONAL TRIBUNALS

JUDGMENT OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

JUDGMENT DELIVERED JUNE 14, 1938[1]

PHOSPHATES IN MOROCCO

THIS is an important decision on the interpretation of the Optional Clause and reservations made in accepting it. The proceedings were instituted by Italy against France, on the ground that certain acts of the authorities in Morocco were contrary to the international obligations of Morocco and France, the Optional Clause being relied upon as entitling Italy to bring the case unilaterally before the Court.

Briefly stated, the Italian complaint was that whereas, in or about the year 1919, an Italian national had acquired certain licences to prospect for phosphates in Morocco, which were governed by Mining Regulations promulgated by a Shereefian *dahir* of January 19, 1914, a new *dahir* was issued on January 27, 1920, reserving exclusively to the Moroccan Government the right to prospect for and work phosphates. This and certain subsequent acts and omissions of the authorities in Morocco were alleged to be contrary to the General Act of Algeciras of April 7, 1906, and the Franco-German Agreement of November 4, 1911, to which Italy had since acceded, and complaint was also made on the ground that Italian nationals had been dispossessed of their vested rights contrary to international law.

In reply to the Italian application the French Government raised a preliminary objection based, *inter alia*, upon the ground that the dispute which Italy had submitted to the Court had arisen in regard to situations or facts prior to September 7, 1931, and accordingly fell outside the scope of the Court's compulsory jurisdiction as determined between France and Italy by the declarations on the subject made by the two governments. It is with this point that the present judgment deals.

The declaration by which France accepted the Court's compulsory jurisdiction, which was ratified on April 25, 1931, is as follows:

> "On behalf of the Government of the French Republic and subject to ratification I accept as compulsory *ipso facto* and without special agreement, in relation to other Members or states accepting the same obligation, the jurisdiction of the Court, in conformity with Article 36, paragraph 2, of the Statute of the Court for a period of five years, in any disputes which may arise after the ratification of the present declaration with regard to situations or facts subsequent to such ratification and which it has not been possible to settle by conciliation proceedings or through the Council under Article 15, paragraph 6, of the Covenant, without prejudice to a case where the parties have agreed or shall agree to have recourse to another method of settlement by arbitration."

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[1] Series A/B No. 74. The Court's publications can be obtained from the English agents: Allen & Unwin, Ltd., 40 Museum Street, London, W.C. 1.

The Italian declaration, which was ratified on September 7, 1931, is as follows:

> "The Italian Government declares that it recognizes as compulsory *ipso facto* in relation to any other Member or state accepting the same obligation, for a period of five years and without prejudice to any other method of settlement provided for in a special convention and if a solution through the diplomatic channel or by proceedings before the Council of the League of Nations should not be reached, the jurisdiction of the Court in the following classes of legal disputes arising after the ratification of the present declaration and relating to
>
> (*a*) the interpretation of a treaty;
> (*b*) any question of international law;
> (*c*) the existence of any fact which, if established, would constitute a breach of an international obligation;
> (*d*) the nature or extent of the reparation to be made for the breach of an international obligation."

This declaration does not contain the limitation that appears in the French declaration concerning the situations or facts with regard to which the dispute arose; nevertheless, as a consequence of the condition of reciprocity stipulated in paragraph 2 of Article 36 of the Statute of the Court, it was common ground that this limitation held good as between the parties.

In its judgment the Court observes that the terms of the French declaration limit the scope of France's acceptance of the Court's compulsory jurisdiction *ratione temporis.* This limitation is twofold. It relates in the first place to the date on which the actual dispute arose. That point was not in question here as the French Government did not deny that the dispute arose after ratification. The second limitation relates to the date (hereinafter called the "crucial date") of the situations or facts with regard to which the dispute arises.

The French Government contended that the situations and facts giving rise to the present dispute were prior to the crucial date. The Italian Government, on the other hand, maintained that the dispute arose from factors subsequent to the crucial date, first, because certain acts, which, considered separately, are in themselves unlawful international acts, were actually accomplished after the crucial date; secondly, because these acts, taken in conjunction with earlier acts to which they are closely linked, constitute as a whole a single, continuing, and progressive illegal act which was not fully accomplished until after the crucial date; and lastly, because certain acts which were carried out prior to the crucial date nevertheless gave rise to a permanent situation inconsistent with international law, which has continued to exist after that date.

In interpreting the French declaration the Court said it was a unilateral act by which the French Government accepted the Court's compulsory jurisdiction. This jurisdiction only exists within the limits within which it has been accepted. In this case the terms of acceptance are perfectly clear; the only situations or facts falling under the compulsory jurisdiction are those which are subsequent to the ratification and with regard to which the dispute arose, i.e. which are the source of the dispute. In these circumstances, there is no occasion to resort to a restrictive interpretation which, in case of doubt, might be advisable in regard to a clause that must on no account be interpreted in such a way as to exceed the intention of the states that subscribed to it. Not only are the terms expressing the limitation *ratione temporis* clear, but the intention which inspired it seems equally clear: it was inserted with the object of depriving the acceptance of the compulsory jurisdiction of any retroactive effects, in order both to avoid, in general, a revival of old disputes, and to preclude the possibility of unilateral submission to the Court of situations or facts dating from a period when the state whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise.

The French declaration mentions situations or facts. The Court was of opinion that the use of these two terms shows the intention of the signatory state to embrace, in the most comprehensive expression possible, all the different factors capable of giving rise to a dispute. The Court also observed that the limitation *ratione temporis* is common to both. The situations and the facts which form the subject of the limitation have to be considered from the point of view both of their date in relation to the date of ratification and of their connexion with the birth of the dispute. Situations or facts subsequent to the ratification could serve to found the Court's compulsory jurisdiction only if it was with regard to them that the dispute arose.

The question whether a given situation or fact is prior or subsequent to a particular date is one to be decided on the facts of each case; and so is the question what were the situations or facts with regard to which the dispute arose.

The parties were at variance as to the crucial date. The French Government placed it on September 7, 1931, the date on which its declaration, being subject to reciprocity, became operative in regard to Italy as a result of the latter's ratification; the Italian Government declared for the date of the French ratification, namely, April 25, 1931. As the Court's conclusions were the same whichever of these two dates was chosen, it did not feel called upon to express an opinion on this point.

The Italian case fell under two heads. They relied, in the first place, upon what was described generally as the monopolization of Moroccan phosphates, and in the second place, upon a decision of the Department of Mines, dated January 8, 1925, rejecting their nationals' claim. As regards the first head, it was admitted that monopolization was a régime instituted by the *dahirs* of 1920, but the Italian Government contended that this régime being still in force constitutes a situation subsequent to the crucial date. The Court rejected this contention, observing that the monopolization was the result of the *dahirs* of 1920, and if, by establishing the monopoly, Morocco and France violated their treaty obligations that violation was the outcome of the *dahirs*. They are the essential facts constituting the alleged monopolization, and consequently the facts which really gave rise to the dispute regarding this monopolization. But by reason of their date these *dahirs* fall outside the Court's jurisdiction. Certain further facts, subsequent to the crucial date, were also relied upon by the Italian Government, but the Court pointed out that they were put forward as part of the alleged monopolization, not as facts which, in themselves and alone, would constitute ground for any dispute between Italy and France.

The second head of the Italian case was based upon alleged violation of vested rights and denial of justice. It was not denied that the dispossession of Italian nationals which was complained of resulted from the decision of June 8, 1925, which, owing to its date, fell outside the Court's jurisdiction. In order to escape this conclusion the Italian Government argued that the dispossession was only fully carried out subsequently to the crucial date. According to them the decision of 1925 constituted only an inchoate violation of international law; certain subsequent acts alone rendered the violation complete and gave rise to the dispute between the two governments. The Italian Government relied especially upon a note dated January 28, 1933, from the French Ministry of Foreign Affairs which was said to amount to a final confirmation of the alleged violation and a final refusal of redress. The Court observed that if the decision of 1925 violated vested rights in the manner alleged by Italy it was in itself a definitive act contrary to international law directly involving the responsibility of France. It was impossible to find in the Note of January 28, 1933, any new fact which could have given rise to the present dispute between Italy and France. It was merely a refusal to settle the dispute between the Italian nationals and the French Government in a particular way. However one looked at the matter it was clear that the decision of 1925 was the fact with regard to which the present dispute between the two governments arose.

The Court therefore decided that it had no jurisdiction to adjudicate on the dispute. The decision was arrived at by a majority of eleven to one, the dissentient being Judge van Eysinga.

Alexander P. Fachiri.

DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

Decisions of the English Courts during the Year 1938[1]

Case No. 1. Perhaps the most important case in the year under review is a decision of the Privy Council with regard to the status of a foreign state ship inside British territorial waters and the position as regards jurisdiction over crimes committed thereon. Further comment is reserved until after the digest of the case.

Chung Chi Chiung v. *The King* (55 T.L.R. 184):

The accused was a British subject serving as cabin boy on a Chinese Government customs cruiser. He acquired British nationality by birth in Hong Kong, but it is probable that he also possessed Chinese nationality *jure sanguinis.* On January 11, 1937, he shot and killed the captain, Mr. Lorne, who was also a British subject and certainly did not possess Chinese nationality as well; he also shot and seriously wounded the chief officer and then tried to commit suicide. The customs cruiser was a state vessel, and it was uncontested that for the purposes of the questions which arose its status was the same as that of a Chinese war vessel.[2] At the time of the attacks made by the accused, the customs cruiser was within the territorial waters of the British colony of Hong Kong and immediately put into harbour there where both the chief officer and the accused were taken to hospital. On February 12, the Chairman of the Provincial Government of Kwangtung province of China asked for the extradition of the accused under Article 21 of the Tientsin Treaty of 1858 which is applied in Hong Kong by an extradition ordinance and which reads as follows:

> "If criminals, subjects of China, shall take refuge in Hongkong or on board the British ships there, they shall, upon due requisition by the Chinese authorities, be searched for, and on proof of their guilt, be delivered up."

The application claimed that the offence had been committed within Chinese jurisdiction. It was refused on the ground that the accused was a British subject.[3]

In view of the wording of the article in the Treaty of Tientsin it is not obvious that it was material on the extradition point whether the crime was committed within Chinese territory or Chinese jurisdiction. The crime was undoubtedly committed within Chinese jurisdiction because the ship flew the Chinese flag. Even if she had not been a state ship, the flag state has always jurisdiction over crimes committed on one of its ships, though, where a merchant ship is in territorial waters there is a concurrent jurisdiction vested in the territorial sovereign. The main question on appeal was whether there was this concurrent jurisdiction when the vessel was a state ship.[1] Probably, however, the article in the Tientsin Treaty is regarded as applying only where the criminals, subjects of China, have committed crimes within Chinese jurisdiction.[2]

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[1] In general, all cases reported in the English Law Reports for 1938, and in contemporary reports covering the same period, are reviewed in this number of the *Year Book* (unless they have already been dealt with in the 1938 volume) together with any cases in any reports for 1939 which have appeared at the time of writing, January 8, 1939.

[2] The reason why it was partially manned by British subjects is no doubt that in China the customs service is largely staffed by foreign officials in the service of the Chinese Government.

[3] Though the report does not make this clear, the refusal may be explained by the ordinary international rule with regard to double nationality, i.e. that the master nationality, which prevails, is that of the country where the question arises: in this case British nationality, because the application for extradition was being decided in British territory. But see also the last sentence of footnote 2, p. 147.

The accused, having been discharged from the extradition proceedings, was arrested and tried for the murder in the courts of Hong Kong on the footing that the murder had been committed in the territorial waters of the colony, and was convicted. He appealed on the ground that the court had no jurisdiction because the offence was committed on a Chinese state vessel. The Full Court at Hong Kong dismissed the appeal in October 1937, and the accused then appealed to the Privy Council on the same ground.

It was contended on behalf of the accused: (1) that under international law the Chinese customs cruiser was a floating piece of Chinese territory, and crimes committed on her were in law crimes committed on Chinese territory and therefore the offence was not committed within the jurisdiction of the colony; (2) that no question of any waiver of immunity arose and no waiver could give jurisdiction; (3) alternatively (if (1) and (2) were not correct), that the vessel and all her crew possessed immunity from the jurisdiction, and the action of the chief officer in landing the accused and putting him in hospital was no waiver.

The opinion of the Privy Council was delivered by Lord Atkin:

He said (1) "It must be always remembered that, so far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules on our own code of substantive law or procedure. The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue, they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. What, then, are the immunities of public ships of other nations accepted by our courts, and on what principle are they based?"

(2) "On the question of jurisdiction two theories have found favour with persons

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[1] The English courts have jurisdiction to try British subjects for murder committed on foreign territory and therefore, if the case had been before the English courts, the view that a foreign state ship is foreign territory would not alone have excluded the jurisdiction in the facts of this case; but the courts of Hong Kong have not jurisdiction to try murders committed by British subjects outside the colony. Therefore from this point of view the fact that the crime was murder and the accused was a British subject was not material.

[2] British subjects in China are subject not to Chinese law and the Chinese courts but to the China Order in Council 1925 and His Britannic Majesty's Supreme Court and consular courts for China. This exterritorial jurisdiction springs from the Treaty of Tientsin 1858 (*vide* Articles 16 and 17). Therefore, when a British subject is found in Hong Kong who has committed an offence in China, the procedure is that he is transferred under the Fugitive Offenders Act for trial by the British court in China and not extradited to the Chinese authorities. The China Order in Council gives jurisdiction to the British courts in China in respect of offences committed within "the dominions of the Republic of China including the territorial waters of those dominions". In view of the decision of the Privy Council in this case that a Chinese state ship is not a floating piece of the dominions of China, it is presumed that the British court in China could not try an offence committed by a British subject on a Chinese state ship on the high seas or in foreign waters. There is therefore, unless the Order in Council is amended, no competent jurisdiction to try a British subject for an offence committed on Chinese ships—state or merchant—on the high seas. Where the British subject is also a Chinese national, the Chinese courts might claim jurisdiction, though it is a controversial question whether the ordinary master-nationality rule operates, in the case of persons of dual nationality in China, to give jurisdiction in China to the Chinese courts or to exclude that of the British courts.

professing a knowledge of the principles of international law. One is that a public ship of a nation for all purposes either is, or is to be treated by other nations as, part of the territory of the nation to which she belongs. By this conception will be guided the domestic law of any country in whose territorial waters the ship finds herself. There will therefore be no jurisdiction, in fact, in any court where jurisdiction depends on the act in question, or the party to the proceedings, being done or found or resident in the local territory. The other theory is that a public ship in foreign waters is not, and is not treated as, territory of her own nation. The domestic courts in accordance with principles of international law will accord to the ship and its crew and its contents certain immunities, some of which are well settled, though others are in dispute. In this view the immunities do not depend on an objective exterritoriality, but on implications of the domestic law. They are conditional, and can in any case be waived by the nation to which the public ship belongs."

The second theory was correct.

(3) The second theory accorded with the view taken in the case of the *Schooner Exchange* v. *M'Faddon*[1] by Chief Justice Marshall of the United States Supreme Court, who described the position of a foreign state ship in a port as one of the cases where, under international law, the local sovereign is held to have agreed not to exercise a part of his territorial jurisdiction, and as similar in principle to the position of a foreign sovereign, foreign diplomatic representatives, or troops of a foreign power, granted free passage through the territory. The position was that there could be claimed for the foreign state ship in port or in territorial waters a certain immunity from the law and jurisdiction of the territorial state, which in principle extended to her.[2]

(4) It followed from this view that the local law and local jurisdiction apply to the ship and to matters taking place on board on the footing that they are in the local territory, save to the extent that the exercise of the jurisdiction is precluded by the immunity: further, that within this precluded sphere the exercise of jurisdiction can take place to the extent that the immunity is waived.

(5) The next question, therefore, was what were the immunities accorded to a foreign public ship and whether they precluded the trial of the accused in this case. It was certain that the foreign public ship itself could not be subjected to any legal process.[3] Further, jurisdiction could not be exercised over internal disputes between the crew and over offences committed by one member of the crew against

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[1] (1812) 7 Cranch. 116.

[2] Reference was made to the report of the Royal Commission as to the reception of fugitive slaves of 1876 under the Chairmanship of Cockburn C.J. on which eminent lawyers sat. In their report it appears that they were nearly equally divided as between the two theories, and that the text-book authorities, whom they quoted, were also divided. Cockburn C.J. said that "the rule *which reason and good sense would, as it strikes me, prescribe*, would be that, as regards the discipline of a foreign ship and offences committed on board as between members of her crew towards one another, matters should be left entirely to the law of the ship, and that should the offender escape to the shore, he should, if taken, be given up to the commander of the ship on demand, and should be tried on shore only if no such demand be made. But if a crime be committed on board the ship upon a local subject, or if, a crime having been committed on shore, the criminal gets on board a foreign ship, he should be given up to the local authorities. In whichever way the rule should be settled, so important a principle of international law ought not to be permitted to remain in its present unsettled state." It is also pointed out by Lord Atkin that the two most authoritative English text-books on international law, Hall and Oppenheim, differ on this point, Hall supporting the view taken by the Privy Council and Oppenheim the other view.

[3] Lord Atkin does not mention it, but it is also clear that the local authorities cannot, as of right, board the public vessel to arrest any person there—it is clear from what follows that he had this in mind.

another,[1] and it was immaterial whether the offender or his victim were local nationals if they were members of the crew. Therefore in principle the present case was covered by immunity and therefore the courts of Hong Kong were precluded from exercising jurisdiction unless the immunity was waived.

(6) The mere fact that, for reasons of humanity, the accused was landed in Hong Kong to go into hospital was not a waiver, and a diplomatic request for his surrender would have been in order. This request was not made but only a request for extradition which was refused because it did not comply with the treaty or the local ordinance applying the treaty. The Chinese Government then made no further claim, but on the contrary permitted four members of their service to give evidence in the trial of the accused before the courts of Hong Kong and left the material evidence for conviction (the revolver bullets, &c.) in the hands of the Hong Kong authorities. Therefore they must be regarded as having waived the immunity which they could otherwise have claimed as regards the trial of this man for this offence, and consequently the courts of Hong Kong had jurisdiction.

In this case the Privy Council, in dealing with the position of a foreign public ship within a port or territorial waters, have rejected the view that the legal questions which arise are to be decided by reference to the principle that the foreign public ship is a piece of floating territory of the flag state, and held on the contrary that such questions must be decided on the basis that the ship and everything on board her is within the local territory and that the local law and territorial jurisdiction apply subject to certain immunities precluding the exercise of that jurisdiction in particular cases. This was a controversial question on which there was a great deal of authority on both sides, and it was clearly open to the Privy Council to adopt either view, though it is possibly surprising to find that, in a matter where they were applying international law and where there was up to date no English decision deciding the matter, no reference was made to the views taken on this point in foreign countries as expressed in decisions of their courts or by modern foreign writers (except to the decision of the Supreme Court of the United States in a classic case). However that may be, the Privy Council have clearly and definitely adopted one view, and no doubt this decision will govern future cases of this kind which arise in British tribunals and may also, since foreign courts engage in researches of rather wider range on international law points, have considerable influence generally.

The floating territory theory which has been rejected had, however, at least this merit, that it supplied a clear legal principle by the application of which almost all the questions which arose could be decided. Matters occurring on board the public ship were to be treated on the same footing as if they occurred inside the territory of the flag state and therefore were subject primarily and exclusively to its law and jurisdiction. If a crime had been committed and the offender had escaped on shore, then extradition was the means by which his trial was to be obtained, and the evidence of any witnesses from the local state which was required would be obtained in the same way as the evidence of witnesses for trials in foreign criminal proceedings is obtained. Instead, the theory of certain immunities from the exercise of jurisdiction is adopted and, as Lord Atkin said, some of these are certain, but others are uncertain. Further, as regards practical convenience, it may be that the "extradition proceedings", &c., involved sometimes by the other theory, are cumbersome. But it is equally clear that, if the "immunities" theory is to work, in some cases the public ship must be able and willing to surrender persons for trial to the local authorities and in other cases the local authorities must be able and willing to surrender to the ship; it is uncertain how far this ability and willingness will be found to exist, and if it does not, it is not clear that the theory adopted is preferable from the point of view of practical convenience.

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[1] The question of offences committed on land by the crew did not fall for consideration in this case, and it is plain it is a separate question whichever of the two theories is adopted.

Under the immunity theory, if a member of the crew commits a crime upon a local resident who is visiting the ship, this is one of the cases where the local courts and authorities may claim to try the offender. If they can catch him on shore, no doubt they can arrest him, but if it is necessary to obtain him from his ship, the captain must be able and willing to surrender him for trial on a diplomatic request. But as many countries adopt the floating territory theory, it is by no means clear that the captain will be able or willing to do so. On the other hand, where a member of the crew commits an offence on the ship against another member of the crew and escapes to the shore, the shore authorities cannot try him unless immunity is waived. Lord Atkin says that in such a case a diplomatic request for his surrender "would be in order", which implies that the local authorities should and could accede to it. Perhaps a statement from so high an authority will enable British authorities to accede to such requests; otherwise the question is not free from doubt and difficulty. It appears that no proceedings in any local tribunal to secure the surrender are intended, and extradition on this view is clearly out of place. The meaning is therefore that, on receipt of this diplomatic request, the local police can arrest the accused man who has deserted from his ship and hand him over to the ship without any warrant (or at least that the captain of the ship can send ashore other members of the crew to arrest him and the local police will stand by perhaps offering assistance but not effecting the arrest), and one must presume that Lord Atkin considers that *habeas corpus* proceedings would not be available in such a case. The man to be handed over is a man who has committed a crime on his ship and then committed the offence of desertion, and Lord Atkin's statement seems to involve the proposition that deserters from foreign warships can and should be arrested by the local police and delivered to their ships without any legal proceedings. The writer is not aware that this has hitherto been the view taken in this country.

As regards the question of waiver, there was a factor in this case which clearly had considerable influence both on the attitude of the Chinese authorities and of the British authorities in Hong Kong, but which is not likely to be present in the ordinary case. This factor was not merely that the offender was a local subject (which would not often be so in the case of a member of the crew of a foreign public ship), but also that the flag state, owing to capitulatory jurisdiction, had no jurisdiction to try subjects of the local state for offences committed in its territory, and that the position as regards persons of dual nationality was one of doubt and dispute.

Case No. 2. The *Arantzazu Mendi* constitutes another important decision relating to the immunity of a foreign sovereign. The case arose out of the Spanish civil war, and raises the question whether, when a foreign state is in the throes of a civil war and the old legitimate government is still exercising authority over part of the national territory, is still recognized as the *de jure* government of the state, and is accorded the immunity of a foreign sovereign government in the English courts, the insurgent government must also be accorded this immunity when it is in effective control of the remainder of the territory and is recognized by His Majesty's Government as the *de facto* government of that part.

The decision of the House of Lords in the *Cristina*[1] had made it clear that, where the legitimate Spanish Republican Government had obtained, against the will of their owners, possession or control of Spanish merchant ships when they were in English ports, in the sense that there was a master on board who was willing to operate the vessel according to the orders of that government issued under requisitioning decrees,[2] the ship was immune from detention or seizure in any process in the English courts, as property in the possession of a foreign sovereign government. There was no decision as to whether or not the requisitioning decrees would be recognized as creating a title to the ships, which the English courts would enforce, if the requisitioning government appeared as plaintiff and sought the assistance of the courts to obtain possession.

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[1] *British Year Book of International Law*, 1938, p. 243.

[2] Whether the master was the original master or a new one placed on board by Spanish consuls, aided by the sympathies of the majority of the crew—the local English authorities neither assisting nor obstructing.

Altogether 46 Spanish vessels were detained in ports of the United Kingdom by reason of process *in rem* instituted in the courts (38 in England, 2 in Scotland, and 6 in Northern Ireland), and the *Cristina* decided an issue which was relevant to nearly all of them. After that decision, 23 vessels (21 in England, 2 in Scotland) were released. The remaining 23 are still detained pending decisions as to the right to detain them, and the case of the *Arantzazu Mendi* is again a test case which decides an issue which affects the majority of these 23 ships. We will now give a digest of the case.

Arantzazu Mendi, [1938] P. 233, 54 T.L.R. 981, Bucknill J. 55 T.L.R. 71, C.A.

The Compañia Sota y Aznar, a Spanish company registered at Bilbao, was the owner of a fleet of 45 vessels (all having "Mendi" as part of their names) registered at Bilbao. Sota was managing director and, after November 1936, he endeavoured to manage as many of the vessels as possible from London, through the Mid-Atlantic Shipping Co. Ltd. as agents.[1] Bilbao fell on June 19, 1937, and Sota and 6 more of the 16 directors of the company, whose sympathies were republican, fled from Bilbao and continued to claim the right to represent the company and run the Mendi vessels as before. The remaining directors, whose sympathies were nationalist, remained at Bilbao and also claimed the right to represent the company and control the ships. The Republican Government's decree for the requisition of Spanish ships registered at Bilbao was issued on June 28, 1937. It was claimed that it was applied to these Mendi ships, but the government seem to have been willing to leave the Sota group to run the vessels. This group formed a new English company—the Bay of Biscay Shipping Company, with Sota as managing director—to purchase the 26 Mendi vessels and transfer them to the British register, and on August 20, 1937, an agreement for the sale of these vessels, including the *Arantzazu Mendi*, to the Biscay Company was signed by Sota on behalf of the owning company, and bills of sale were issued.[2]

The *Arantzazu Mendi* came to London on August 10, and on August 24, while she was there, the Bilbao group of directors issued a writ *in rem* against her, claiming possession in the name of the Compañia Sota y Aznar as owners and contending that Sota and his group had no right to control or sell her.[3] On August 31 Sota gave notice of motion to stay the action on the ground that the plaintiffs had no authority to sue in the name of this company. The Republican Government and the Biscay Company also entered conditional appearance. On August 27 the Bilbao directors also started proceedings in the name of the company in the Chancery Division against Sota, claiming a declaration that the agreement of August 20 did not bind the company. The proceedings on the action *in rem* for possession were thereupon adjourned by consent pending the result of the Chancery proceedings. On March 20, 1938, the Chancery proceedings ended in a settlement. Sota abandoned his claim to represent the company and to control the vessels.[4] As the Chancery proceedings ended in leaving the Bilbao directors in control of the vessels, they discontinued their actions *in rem*, under which the vessels had been arrested (in the case of 9 out of 11 vessels). In the case of this ship, the notice of discontinuance was served on

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[1] The Republican Government, however, requisitioned 2 vessels, the insurgent Government 15, and 2 were lost, but 26 Mendi ships were run in this way.

[2] Presumably the Spanish Republican Government concurred in this sale.

[3] Similar proceedings were taken in the case of 11 other vessels included in the sale of August 20.

[4] No doubt the decision of the Court of Appeal in the *Banco de Bilbao* case that the legislation of General Franco's Government must be recognized as the law governing companies incorporated at Bilbao (*B.Y.B.I.L.*, 1938, p. 241) helped to bring about this result.

April 12, but the Spanish Republican Government immediately—on April 13 in the case of this vessel, before the arrest of the vessel had been actually raised—issued writs *in rem* claiming possession of these 9 vessels and 3 other Mendi vessels, on the ground that it had requisitioned them. In the case of the *Arantzazu Mendi*, a notice of requisition served on Sota on March 23, just before he had ceased to be managing director as a result of Chancery proceedings, was relied upon. Sota also gave evidence that he had held this vessel at the disposal of the Republican Government from the date of the decree of June 1937 till he ceased to be managing director. The Republican Government also stated that it had dismissed the master R.[1] On April 20, the (insurgent) Nationalist Government entered a conditional appearance and on May 7 issued a notice of motion to set the writ aside, claiming (1) that it was in possession of the vessel on the grounds that on April 5 by a notice served on the master R, it had requisitioned the vessel under a Nationalist decree of March 1938, and that the master R. had undertaken to hold the vessel to the orders of the Nationalist Government, and that on April 30 the new managing director of the owners formally acknowledged the requisition on behalf of the owners, and (2) the right to enjoy the immunity from the jurisdiction accorded to property in the possession or control of a foreign sovereign. The owning company and the master also entered an appearance. On May 28, in reply to a letter from the judge (Bucknill J.), the Foreign Office wrote a letter in which it was stated that:

(1) H.M.G. recognized Spain as a foreign sovereign state;

(2) H.M.G. recognized the Republican Government as *de jure* government of Spain and no other government as *de jure* government of any part of Spain;

(3) That the Spanish Nationalist Government was a government in conflict with the Republican Government, claiming to be the government of Spain and seeking to overthrow the Republican Government and establish its own authority over the whole of Spain. It was not subordinate to any other government in Spain;

(4) H.M.G. recognized the Nationalist Government as the government which then exercised *de facto* administrative control over the greater portion of Spain, including all the Basque provinces, but had accorded no other recognition to it;

(5) That the question whether the Nationalist Government was to be regarded as that of a foreign sovereign state appeared to be a question of law to be answered in the light of the preceding statements and having regard to the issue in which the question was raised.[2]

There were two questions to be decided:

(*a*) whether the Spanish Nationalist Government could claim the immunity accorded to the government of a foreign sovereign state; Bucknill J. said this was a question of law and turned on whether the facts as proved by the Foreign Office letter "constituted according to English law the Nationalist Government as a foreign sovereign state"; the principal argument to the contrary was that immunity could not be claimed in respect of two governments within the same state, Spain;[3]

(*b*) whether that government had, in fact, possession of the ship. This was contested on the ground that up to the time of the arrest, arising out of the proceedings brought on August 24, the vessel was under the control of Sota who held it at the disposition of the Republican Government; after that, the vessel being under arrest was in the possession of the Admiralty Marshal and was still under arrest on April 5 when the Nationalist requisition was effected (as it also was when the formal requisition of the Republican Government took place on March 23) and remained under arrest in the first action until it was re-arrested in the second action on April 13.

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[1] R. had been appointed master by Sota as managing director in May 1937, but it would appear that he had changed his coat.

[2] Goddard L.J. in the Court of Appeal indicated that he thought that the Foreign Secretary should have stated in his letter whether the Spanish Nationalist Government was or was not the government of an independent foreign state and not left this question to the court; but it would appear that the Foreign Office letter gave all the *facts* as to recognition and otherwise, and only left a question of law to the court.

[3] It was argued in the alternative on behalf of the Nationalist Government that the dispute, being one as to a foreign ship between two foreign governments, the court had a discretion to refuse to decide and should refuse to do so.

Held by Bucknill J.:

(*a*) That the essentials required to constitute a government as the government of an independent sovereign state are (i) that it administers a territory; (ii) that it is absolutely independent and not subordinate to any other authority so that in its territory no foreign judgment can be enforced against it, and it can extend reciprocal immunities in its courts to other foreign states.

(*b*) That the Spanish Nationalist Government fulfilled these qualifications, and it was in fact only because it did fulfil them that the Court of Appeal in the *Banco de Bilbao* case could and did recognize its legislation as the law of the territory controlled by it and the only law of that territory: a government, whose legislation was so recognized, must be held to be a government entitled to the immunity of a foreign sovereign state. The English decisions in *Luther* v. *Sagor*[1] and the *Gagara*[2] showed that immunity in England was accorded to a government only recognized *de facto*.

(*c*) That there can, under international law, be within the territory of the same state two independent governments, one *de jure*, and the other *de facto*, both entitled to claim the immunity.[3]

(*d*) That though the ship was under arrest the Spanish Nationalist Government had in fact a limited possession of the vessel because the master held it at their orders.

(*e*) Therefore the writ must be set aside and the arrest raised.

On appeal the Court of Appeal affirmed the judgment of Bucknill J., Slesser L. J. declaring that the second point—possession—gave him the greater difficulty since the legal possession of the ship was at all material times vested in the Marshal, and it was not possible to hold that the Nationalist Government had it. Nevertheless, the Nationalist Government had proved an interest in the ship, namely the power of disposition and control which the owners and captain admitted under the Nationalist requisition, and this interest was threatened by the claim to possession made in the writ issued by the Republican Government, and, as stated in the House of Lords in the *Cristina* case (in particular by Lord Wright), a foreign sovereign, who shows that a right which is not merely not proprietary, but not even possessory, namely a right of control of a ship, is put in issue, can claim that he is impleaded.

It will be observed that in this case, the question of immunity again prevented a decision on the question whether a foreign government's requisition of a ship in a United Kingdom port creates a title which the English courts will enforce, and if so, whether the Republican Government or the Nationalist Government could validly requisition this ship. One *obiter dictum* of Bucknill J. suggests that he was inclined to think that only the Nationalist Government could do so because it belonged to a Bilbao company and Bilbao was in Nationalist territory. No further comment will be made here on the decision that the insurgent Spanish Nationalist Government possesses the status entitling it to claim immunity, as it is believed this case is to go on appeal to the House of Lords. This case shows how the actual possession or control of the ship, necessary to justify the claim of immunity, may raise nice issues in the case of these ships, with the fluctuating loyalty of masters and crews. It also shows the two contending Spanish governments, by arrest and counter-arrest of Spanish ships, manœuvring and fighting in the English courts.[1]

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[1] [1921] 3 K.B. 532.

[2] [1919] P. 95.

[3] The conclusion reached in this case is that suggested in the 1938 *Year Book*, for the same reasons as those relied on by Bucknill J., but reference was also made to certain U.S. decisions which are not referred to in the report (see 1938 volume, footnotes on pp. 241 and 244).

Case No. 3. The case of *Haile Selassie* v. *Cable and Wireless Ltd.* has given rise to three new decisions; the first is one of the Court of Appeal, overruling a decision of Bennett J.,[2] in which he declined to decide the merits of the claim on the ground that to do so would violate the immunity of a foreign sovereign government not party to the proceedings—the Italian Government. In the 1938 volume, reasons were given for thinking that this decision, or at any rate, the ground on which it was based, was an excessive extension of immunity.

The case then went back to the trial judge for decision on the merits, and we now have the decision on the merits given in first instance, and a decision of the Court of Appeal reversing that decision. The issue on the merits of the case was a question of state succession arising out of the Italian annexation of the territory of the formerly independent state of Ethiopia. Further comment is reserved till after the digest.

Haile Selassie v. *Cable and Wireless Ltd.* (No. 1) [1938] 1 Ch. 545, 54 T.L.R. 629 (Bennett J.), 54 T.L.R. 996 (C.A.); (No. 2) 54 T.L.R. 1087 (Bennett J.), 55 T.L.R. 209 (C.A.).

[3]The plaintiff, Emperor of Ethiopia, in exile in England, claimed from the defendant company a balance due under a concessionary contract entered into in 1934 with a Department of the Ethiopian Government representing the plaintiff in his capacity as sovereign of Ethiopia. The defendant company admitted a balance to be due from them, but produced letters from the Italian Ambassador in London stating that the balance was now payable to the Italian Government, as the new sovereign of Ethiopia, and that the Italian Government did not agree to submit to the jurisdiction of the English courts for the determination of their claim. Letters from the Foreign Office dated January 1938 were produced to the court stating that His Majesty's Government (1) recognized the plaintiff as *de jure* Emperor of Ethiopia; (2) recognized that the Italian Government were the *de facto* government of all parts of Ethiopia under their control, and that they were in effective control of virtually the whole of Ethiopia and had so been as from December 1936; (3) recognized Dr. Martin as the Minister Plenipotentiary of the plaintiff accredited to the Court of St. James's.

The defendant company were unable to take the normal course open to a party who owes money which two other parties claim, namely interpleading, because that would involve impleading the Italian Government who did not submit to the jurisdiction.[1] The defendant company, therefore, contested the plaintiff's claim and contended that the right to recover these moneys had passed from the plaintiff to the Italian Government (1) because Italy had annexed Ethiopia and become the sovereign of the country; or alternatively because the Italian Government were now recognized by His Majesty's Government as the *de facto* government of Ethiopia, and (2) the right to the debt was a public right appertaining to the sovereign power in Ethiopia.

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[1] The following decisions arising out of the Spanish civil war may be noted, though no question of international law is involved:

Totem v. *Gamboa*, 61 Ll. L. Rep. 149: a 30 days' charter of a ship, for evacuation of civil population from Northern Spain, was held to be frustrated by a seizure of the ship by Spanish Nationalists and its detention for two months;

Gulnes v. *Imperial Chemical Industries*, 54 T.L.R. 194: the charter of a ship was held to be frustrated when it was bombed in a Spanish harbour and so damaged as to be not worth repair, although the charter party contained a clause providing for payment of demurrage for detentions arising out of the Spanish civil war;

Spanish Government v. *North of England Steamship Company*, 54 T.L.R. 852: a charter party contained a clause referring to "blockaded ports". *Held* that words were used in the strict legal sense, and Barcelona was not at any time a blockaded port;

Robson v. *Sykes*, 54 T.L.R. 727: a voyage on a vessel carrying nitrate to insurgent naval base at Seville was held not to be an ordinary commercial voyage, and seamen who had signed on for such ordinary service were justified in refusing to sail.

[2] Discussed in the 1938 volume of the *Year Book* (at p. 289 and pp. 247–8).

[3] For a further statement of facts see *B.Y.B.I.L.*, 1938, p. 239.

Bennett J. *held*:

That the action must be stayed because he could not pronounce on the claim of the plaintiff without determining whether that of the Italian Government to this money was well founded; and this would be violating the immunity which the Italian Government could claim in respect of its public property. He apparently considered that it was a violation of the immunity of a foreign sovereign to give a judgment determining the title to property which this sovereign claimed (whether he was in possession of it or not), and that this principle applied if the "property" in question was merely a *chose in action* (viz. a right to a debt).

Held by the Court of Appeal:

(1) That to decide whether the plaintiff's claim to recover this money from the defendant company was well founded (i) would not violate the personal immunity of the Italian Government from process, since that government was not made a party to the proceedings nor was it a necessary party; (ii) would not violate any immunity of the Italian Government in respect of its property since that immunity could only be claimed when the property was admitted or shown to be in its possession or control or in that of an agent holding on its behalf, or admitted or proved to belong to it as owner. It was not sufficient to establish immunity that a foreign sovereign *claimed* to own, possess, or control something which one party claims from another party. In the case of claim to a debt owned by the defendant company *ex hypothesi* the Italian Government could not be in control or possession, and, therefore, its right to the debt—the very question in issue in the action—had to be decided before the immunity could be claimed.

(2) That, therefore, the case must go back to Bennett J. to decide this issue.

Bennett J. then *held*:

(1) that the question was whether the right to this debt, a right which belonged to the sovereign power in Ethiopia, must be held to have passed from the plaintiff, who was still recognized as *de jure* sovereign, to the Italian Government, who were recognized by His Majesty's Government as the *de facto* government of the country:

(2) that there was no English authority applicable to these facts, but in his view the title to sue for this debt had been vested in the plaintiff as sovereign monarch of Ethiopia, and the occupation of Ethiopia by the Italian army and the establishment of the Italian Government as the *de facto* government of the country, depriving the plaintiff of all actual power there, did not have the effect of divesting him of this title.

The defendants appealed against this decision but, before the hearing in the Court of Appeal on November 3, 1938, His Majesty's Government had announced in Parliament that it was their intention in a very short time to recognize the King of Italy as the *de jure* sovereign of Ethiopia, and the Court of Appeal decided to adjourn the hearing until after the probable date of this new recognition. When the hearing took place, a certificate from the Secretary of State for Foreign Affairs was produced, dated November 30, to the effect that His Majesty's Government no longer recognized the plaintiff as *de jure* Emperor of Ethiopia.[1]

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[1] A defendant who interpleads serves a notice on the plaintiff and on the other party who claims the money and both these parties are obliged to appear if they wish to pursue their claim. If either of these parties does not appear to the notice, judgment may be given against him. If both appear, the court settles the issue to be tried between them, making one plaintiff and the other defendant according to the circumstances, and the original defendant pays the money into court and drops out of the proceedings. The view was accepted in both courts that an interpleader notice could be served on a foreign government (this question is discussed at p. 248 of the 1938 volume).

Held by the Court of Appeal:

(1) In these circumstances the right to sue in respect of what was part of the public state property of Ethiopia passed from the plaintiff, and became vested in the King of Italy;

(2) That the transfer of this right must now be deemed to have taken place not later than December 1936, the date as from which His Majesty's Government recognized that the Italian Government had established *de facto* effective control over the country;

(3) That as this date was prior to the issue of the writ in this action, the plaintiff's claim must be regarded as not established, and the appeal must be allowed;

(4) That the Court of Appeal would express no opinion on the correctness of the decision of Bennett J. on the facts as they were when he delivered judgment; it might have been necessary to do so to decide the question of costs, but the plaintiff had not contested the conclusions (1), (2), and (3) above on the new state of facts, and there could be no order as to costs as to the hearing on these points and the defendants preferred to let the plaintiff keep the order for costs of the hearing in first instance given by Bennett J. rather than risk having to bear the costs of the hearing in the Court of Appeal as well, in the event of a full argument on the correctness of Bennett J.'s decision taking place and it being held that he was right.

The first judgment of the Court of Appeal in this case throws further light on the second head of the immunity of foreign sovereigns—namely the immunity of their property from seizure, detention, or transfer to another party, under a judicial order. It makes it clear that this immunity only arises when it is admitted, or proved, that the foreign sovereign controls, possesses, or owns the property and that a mere claim by him to control, possession, or ownership is not sufficient. It justifies the doubts expressed in the 1938 volume, p. 248, as to the correctness of Bennett J.'s first decision, and relies on the observations of Lords Wright and Maugham in the *Cristina* case quoted on p. 246 and referred to on p. 248. These observations were made in connexion with proceedings *in rem*, which result in giving a title to the *res* valid against all claimants, and in which claimants who do not wish their interests to be prejudiced must appear. They must apply *a fortiori* to the case of an action *in personam*, since any judgment for the payment of a debt or delivery of property in such proceedings does not affect the rights of any persons not parties to the proceedings. Indeed, it is not clear if the immunity of a foreign sovereign as regards his property can come into play (as distinct from his personal immunity) except in proceedings which have this *in rem* character.

The second judgments of Bennett J. and the Court of Appeal deal with a question of state succession. In the first place, it was held as a proposition too clear for argument that the new sovereign of the territory of a former independent state acquired by conquest succeeds to a debt in England, which was owed to the former sovereign in his public capacity, when the new sovereign's title is recognized *de jure* by His Majesty's Government. (There would clearly also be a succession to other property in England.) In the second place, there is a decision in first instance, neither affirmed nor impugned on appeal, that this succession to property in England does not take place when the old sovereign is still recognized *de jure* and the new sovereign as only a *de facto* government of the territory. In the third place, when once the *de jure* recognition takes place, it relates back, for the purpose of succession to property, at any rate to the time when His Majesty's Government first recognized that the new sovereign had acquired a

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[1] See footnote 1 on p. 157, below, on the admission of evidence of new facts (or of new enactments) supervening after the hearing in first instance.

de facto title. This is a further application of the principle of 'relation back' discussed in the 1938 volume at pp. 238–9. It was not necessary in this case to consider whether the facts and evidence justified carrying the relation back farther than the date when His Majesty's Government first made known their *de facto* recognition, which might have been later than the facts which first justified it.[1]

In *Case No. 4, Kawasaki, &c.* v. *Bantham Steamship Company, Ltd.* ([1938] 1 K.B. 805; 54 T.L.R. 901) a charter party, dated June 1936, contained a clause giving the shipowner the right to cancel the charter "if war breaks out involving Japan", and the shipowner cancelled the charter on September 18, 1937. The charterers contended:

(*a*) that the word "war" must be given its proper technical meaning as ascertained from the rules of international law, and that there was no war between Japan and China because (i) no declaration of war had been made; (ii) each side maintained diplomatic representatives with the other; (iii) the hostilities which were taking place were a forcible intervention by Japan in Chinese territory resisted by China; and (iv) neither side chose to call it a war.

(*b*) that (i) the question whether there was a war between two foreign powers was a question of which the court took judicial notice and on which it had to inform itself by means of information from the Foreign Office, being bound to act on the reply given by the executive, seeing that the determination of the existence of such a war was a matter of high policy with regard to which there must be no conflict between the courts and the executive; and (ii) the letters from the Foreign Office, which were produced, stated that the situation in China was anomalous and His Majesty's Government were not prepared to say that in their view "a state of war existed" in September 1937.

If the court had decided the case on the basis contended for by the charterers, the decision might have been an interesting one from the point of view of international law, but Goddard J. held that the charter party was a commercial contract and the parties in using the word "war" intended it to have the meaning which ordinary commercial men would give to it. It therefore included an armed conflict between two powers which in its effect on commercial operations—particularly shipping operations—had the same sort of effect as a declared war, and these military operations in which Japan was seeking to drive Chinese armies from Northern China and Shanghai and to enforce her control of these areas and in which China was resisting to the utmost of her capacity had this effect. The Foreign Office letter in fact suggested that the word "war" might not always have the same meaning and it might depend on the document to be construed what meaning it had.[2]

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[1] The position of the Court of Appeal when it adjourned the hearing of the second appeal was a difficult one. On the one hand, it might be said that it was hard on the plaintiff to wait for an event to happen which would destroy his case retrospectively when, if judgment was given promptly, the judgment in first instance gave him substantial hopes of success on appeal, and all the harder as the decision on the merits of his claim had been delayed by an initial wrong decision declining to decide it. On the other hand, if the Court of Appeal had at once decided in his favour, a further appeal to the House of Lords, and a stay of execution pending it, was inevitable and the Court of Appeal thought that the House of Lords was in the same position as itself, in that it would have to take account of the supervening fact of *de jure* recognition (the view has been expressed that, as the appeal to the House of Lords is not like that before the Court of Appeal "by way of rehearing", this is not so). In any case there was the position of the defendants to consider, who had not been able to enjoy the usual relief of a party in their position of interpleader; consequently having satisfied the judgment in favour of the plaintiff they might again have had to meet the claim of the Italian Government which would become retrospectively irresistible after the *de jure* recognition took place—the judgment in favour of the plaintiff not affecting its claim since the proceedings were *in personam* and that government was not a party thereto.

[2] Goddard J. said he accepted the definition of war taken from Hall's International

Case No. 5, New Brunswick Railway Company v. *British and French Trust Corporation, Ltd.* (55 T.L.R. 260) is a decision of the House of Lords in a case relating to bonds with a gold clause issued in one country and payable in another, which has already been dealt with in two previous numbers of the *Year Book*. In the 1937 volume, the facts and judgment in first instance are given at p. 210, and on pp. 218–20 the case is discussed with other decisions in analogous cases in an endeavour to discover the principles to be deduced from these recent cases which form part of the English rules of private international law relating to contracts. A question which seemed to call-for special consideration was the following. There is no doubt:

(1) that the general proper law of the contract (we say "general" because a contract may have more than one proper law—a second proper law governing some portion of it) governs the interpretation of its provisions and is referred to to ascertain what the parties meant;

(2) that the obligations of the parties as ascertained under (1) are affected by any provisions of the general proper law which may modify their effect—such as provisions rendering one or more of the contractual obligations illegal or void,[1] or substituting one obligation for another (e.g. reducing the rate of interest or extending the date for performance, &c.);

(3) that the law of the place of performance (even if it is not a proper law of the contract at all) affects the obligations resulting from the contract and its proper law, in so far as it makes performance illegal or impossible; further, where money is payable, it necessarily determines the money in which payment is made as opposed to its amount.

The question for consideration, however, was whether provisions of the law of the place of performance, which entitle the debtor to discharge his obligations by tendering less than the terms of the contract require[2] without rendering it illegal or impossible to fulfil those terms, are applicable when the (general) proper law is another law. On this point two alternative propositions have been formulated by the writer in previous numbers of the *Year Book*:

(*a*) *That provisions of the* lex loci solutionis *with regard to the manner in which the obligations may be discharged are always applicable;*

(*b*) *That it is a strong presumption only rebuttable by express words or very special circumstances that, where a contract is to be performed in a country other than that of its general proper law, the* lex loci solutionis *is a secondary proper law applicable as regards the method of performance and determining what is a discharge.*[3]

Law and quoted with approval in *Dreifontein Consolidated Gold Mines* v. *Janson*, [1920] 2 K.B., at p. 343. "When differences between states reach a point at which both parties resort to force, or one of them does acts of violence which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other, until one of the two has been brought to accept such terms, as his enemy is willing to grant."

[1] *Vide* decision of the House of Lords in the *International Trustee* case (*B.Y.B.I.L.*, 1937, p. 212), applying the Joint Resolution No. 10 of 1933 of the United States Congress striking down the gold clause in bonds whose proper law was, as held by the House, American.

[2] Sc. in principle provisions entitling the creditor to demand more would stand on the same footing.

[3] These alternative propositions will, in the generality of cases, lead to the same result but not always, as (*a*) purports to express a rule of law applying necessarily independently of any intention of the parties, and (*b*) is only a presumption determining what the parties are to be deemed to have intended if they have not provided to the contrary. (*a*) was how the position was stated in the 1934 volume of the *British Year Book* at p. 189, principally on a first view of the House of Lords judgments in the *Adelaide Electric Supply* case. (*b*) was the proposition formulated in 1937 at pp. 218–20 after further consideration of this case together with the *International Trustee* case (C.A. and House of Lords).

In the 1938 volume the judgments delivered in the Court of Appeal in the present case (*New Brunswick Railway Co.*) were considered at pp. 256–8, together with two Privy Council decisions (*Mount Albert Borough Council* and *Auckland Corporation* cases), and some difficulty was expressed in deducing the principles from all these decisions. Now we have the House of Lords decision in the *New Brunswick Railway* case, and it seems possible to state conclusions with greater confidence. It is, however, first necessary to say something of the facts of the case and what was decided.

The New Brunswick Railway Company, a Canadian corporation, had issued sterling bonds in Canada under powers conferred by Canadian legislation. The bonds contained a gold clause and were payable in England. The plaintiffs were holders of bonds and were claiming payment of principal and interest on the footing that the gold clause was a gold value clause. In 1937, after the judgment in first instance and before the hearing in the Court of Appeal, the Canadian Gold Clauses Act was passed, Clause 4 of which provided as follows:

> "In the case of any gold clause obligations governed by the law of Canada payable in Canada or elsewhere, in money other than money of Canada, tender of the nominal or face amount of the obligation in currency which is legal tender for the payment of debts in the country in the money of which the obligation is payable shall be a legal tender and the debtor shall, on making payment in accordance with such a tender, be entitled to a discharge of the obligation."

The House of Lords[1] were unanimous (like the Court of Appeal) in holding the gold clause to be a gold value clause (but they differed from the Court of Appeal in holding that it applied to the principal only and not to the interest). They arrived at this conclusion following their own decision in *Feist*'s[2] case and without considering for this purpose what was the proper law of the contract. The gold clause in this case, according to the consistent literal meaning of its words, provided for payment in gold coin, but the Law Lords made it clear that they considered that all gold clauses must be construed according to their common intention of protecting lenders from depreciation of currency rather than by the literal meaning of their words: and thus gold clauses are always gold value clauses. Further, their Lordships made it equally clear that they considered that there should be uniformity in the interpretation of gold clauses internationally: they thought that their *Feist* decision had been so widely followed abroad as to justify the view that there was such uniformity. Therefore merely for interpreting a gold clause it was unnecessary to consider the proper law of the contract—it is clear that there was no intention of throwing doubt on the general rule that the proper law is to be referred to for purposes of interpretation.

Four of the five members of the House held that the Canadian Gold Clauses Act did not apply in this case on the ground (also adopted in the Court of Appeal) that the Act, which provided that a debtor who had tendered and paid in a particular way should be discharged, only came into force after the defendant in this case could no longer make a further tender since the plaintiffs had issued their writ and judgment in first instance had been given. Although it applied to obligations which had matured and to payments already made, it should not be interpreted as applying retrospectively to alter the rights of parties which had crystallized by the commencement of proceedings and (per the Lord Chancellor only) even if its intention was so to apply, the rights of parties in English legal proceedings could not thus be affected by the retrospective foreign legislation.[1] Being able to dispose of the Canadian Act in this way,[2] it was unnecessary for them to consider what was the proper law of the contract or the question which forms the subject of the two alternative propositions printed in italics above, and they did not do so.

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[1] Before the present action on some 900 bonds was brought, the plaintiffs had brought an earlier action on a single bond and obtained by default a judgment against the defendants, declaring that the gold clause was a gold value clause as to principal and interest. There was no doubt that this default judgment made the obligation arising on this bond *res judicata*. The question was whether, seeing that the bonds were all the same, the defendants were estopped on the ground of *res judicata* from contesting this interpretation as regards the 900 bonds in the second action. The Court of Appeal held that they were because the parties were the same and the issue was the same. Hilbery J. in first instance and Lord Romer in the House of Lords held that, since each bond was a separate cause of action, there could be no estoppel. The Lord Chancellor, Lord Russell, and Lord Wright reserved the question whether a judgment, given on one cause of action or one instrument, can ever create an estoppel on the ground of *res judicata* in a subsequent action on another cause of action or other instrument (even if precisely similar), but decided that this can never be the case where the judgment in the first action is a judgment by default.

[2] *B.Y.B.I.L.*, 1934, pp. 184 and 187.

These two points were considered by Lord Romer as they had also been considered by the Court of Appeal. Lord Romer says that *where the proper law of a contract is English law but it is to be performed in a foreign country* "*a term is to be implied in the contract that such performance is to be regulated by the* lex loci solutionis", *and in the absence of evidence that Canadian law differs from English law in this respect, it is to be assumed that this rule prevails in Canada.* He then goes on to say that if there is any provision in the Canadian Act that affects the measure of the company's obligations, it would apply on the assumption that Canadian law is the proper law of the contract, but he finds on the construction of the Act that none of its provisions which are applicable purport to nullify the gold clause. They leave it valid but provide a method by which the resulting obligation can be discharged, and therefore only apply where performance is to be made in Canada. Therefore even if Canadian law is the proper law (he does not say whether it is or not—the majority of the Court of Appeal had held it was but that English law was also a (secondary) proper law governing the performance of the obligation) it leaves the obligation untouched.

To return to the two alternative propositions set out above in italics, the judgment of the Court of Appeal accords precisely with alternative (*b*). Lord Romer's words, "an implied term . . . ", are clearly inconsistent with (*a*) but quite consistent with (*b*). Lord Romer merely introduces the refinement that this presumption is a rule of English law and therefore applicable when the general proper law is English or when it is not shown that the general proper law has no similar rule. Further, the judgments in the House of Lords in the *Adelaide Electric Supply* case[3] (see Lord Tomlin at p. 145 "Where, in an English contract governed *prima facie* by English law, there is a provision for performance in part in another country, the *prima facie* presumption is that that performance is to be in accordance with the local law"; Lord Wright uses practically the same words at p. 151) are in exact accordance with (*b*) and inconsistent with (*a*). (*a*) can therefore be rejected. (*b*) is consistent with all the recent cases, except the decision of the Court of Appeal in the *International Trustee* case—overruled on another ground,[1] and so far as the writer is aware there is no earlier authority of importance against it. It is believed therefore that there is now sufficient authority for holding (*b*) to be a rule of English private international law. It is an interesting and important development.

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[1] It is clear that the Court of Appeal (an appeal to the Court of Appeal is by way of rehearing) can take account of changes of law and of fact supervening since the judgment in first instance and reverse that judgment solely on the new material. In the *Cables and Wireless* case (p. 154 above) we have seen the Court of Appeal deciding a case on a supervening fact retrospectively affecting the rights of the parties as at the date of the issue of the writ; changes in the *lex fori* which are sufficiently clearly retrospective can have a similar effect.

[2] The Lord Chancellor also held, as a matter of construction and interpretation of the Canadian Act itself, that it was only intended to apply to cases "where the action to recover the amount due is brought in Canada". It is not possible to set out here the Lord Chancellor's reasons for this view, and it is open to doubt whether such view will ultimately prevail. The Lord Chancellor's view means, in effect, that the Act is to be classified as a procedural statute. Substantive provisions are often enacted in the form of procedural provisions but even then according to the better view they should not be classified as procedure. To treat as a procedural statute a provision which is not merely clearly a substantive one in effect but which is not even cast in the form of procedure but as a provision providing how all obligations governed by the law of Canada are to be discharged, seems to be really inadmissible. No other judgment in this case adopts this view, and it is only one alternative in the judgment of the Lord Chancellor.

[3] [1934] A.C. 122.

Case No. 6, De Bueger v. *J. Ballantyne & Co.* ([1938] A.C. 452: 54 T.L.R. 450) is a further decision of the Privy Council on appeal from New Zealand in a case arising out of the difference in value between the New Zealand and English pound. The *Auckland Corporation* case (*B.Y.B.I.L.*, 1937, p. 257) also arose out of this difference and the *Adelaide Electric Supply* case (*B.Y.B.I.L.*, 1934, pp. 184 and 189) out of the difference in value between the Australian and English pound. In the *Auckland* and *Adelaide* cases the contracts simply provided for payment in *pounds*: the proper law was New Zealand law in the first case and English law in the *Adelaide* case, but this did not affect the decision as the view was taken that the word "pound" in a contract (whatever its proper law) refers to a unit of account which is common to the United Kingdom, Australia, and New Zealand, and gives no further information as to the value of the obligation,[2] and the parties must be regarded as leaving it to the *lex loci solutionis* to determine which pound must be tendered to discharge the debt, i.e. English pounds when payment was made in England (*Auckland* case) and Australian pounds when payment was made in Australia (*Adelaide* case).

In this last case there was a contract made in England, between parties resident and having an office there, for the employment of the plaintiff in New Zealand for a salary, payable in New Zealand, of "£700 *sterling*" a year. The proper law of the contract was English and but for the word "sterling", which was added in this case and did not occur in other cases, it would have been clear on the two earlier cases that the debt would be discharged by the payment of 700 New Zealand pounds (worth at the different dates from 10 to 25 per cent. less than the English pound). It was held, however (overruling a majority decision of the Supreme Court of New Zealand), that the addition of the word "sterling" made all the difference. Here the parties had fixed the value of the debt by express reference to United Kingdom pounds (sterling) and this debt must be discharged by the payment of a number of New Zealand pounds equal in value to 700 pounds of the United Kingdom.

Case No. 7. In *Pyrmont, Ltd.* v. *Schott*, 54 T.L.R. 178 (*Privy Council*) there was a loan between two persons in Gibraltar of a sum in Spanish pesetas repayable in Gibraltar. In accordance with previous decisions (in *re Chesterman's Trusts*, [1923] 2 Ch. 483) with regard to obligations to pay in British territory sums in foreign currencies, which are to be regarded as obligations to furnish a commodity and not to pay money,[3] it was held that performance must be made in what was legal tender by the law of Spain at the date when repayment was made. The law of the country whose currency was the commodity to be supplied determined what had to be tendered. Banknotes of the Bank of Spain were not legal tender, though commonly used, and gold and silver coins were alone legal tender. Judgment was therefore given for a sum in sterling equivalent in value to the sum in Spanish coins at the rate of exchange prevailing at the time when payment should have been made and interest thereon at the contract rate. The question arose because by reason of Spanish regulations of 1936, the export of gold and silver from Spain was prohibited and also the export of banknotes of the Bank of Spain unless accompanied by an export permit (*guia*), and the import of such banknotes was also prohibited unless the export permit was attached. Hence peseta notes unaccompanied by export permits were of less value than pesetas in legal tender or peseta notes accompanied by export permits (namely 42 pesetas to the pound as compared with 36·80).

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[1] The Privy Council decision in the *Mount Albert Borough Council* case (see *B.Y.B.I.L.*, 1938, p. 256) which appears at first sight to be a difficulty is not really so. The provision of the *lex loci solutionis* whose application was rejected in that case was not one relating to method of discharge but altering the terms of the obligation, viz. changing the rate of interest. Admittedly the distinction between a provision declaring a gold clause void (altering the terms of the obligation) and a provision saying it may be discharged by paying in paper is artificial, and to the legislator probably these are merely two ways of doing the same thing, but there seems no escape from an artificial distinction here.

[2] At any rate when it has to be discharged in a country whose currency is also in pounds: sc. the proper law would determine which *pound* measured the value of the debt when it had to be paid in a country whose currency was (say) in dollars.

[3] It is for this reason that the English courts do not give judgment for the payment of the sum in foreign currency but for its sterling equivalent at the date when the foreign currency should have been tendered (see *The Baarn*, *B.Y.B.I.L.*, 1935, p. 209, and 1934, p. 191).

Case No. 8. Simons v. *Simons*, 55 T.L.R. 120 (Goddard L.J. sitting as additional judge in the King's Bench Division).

> H. and W. married and were domiciled in Cornwall. In 1916 H. went to Boston, Massachusetts, and set up a business there. In 1923 W. let the house in Cornwall and joined H. in Boston, bringing the children. In 1924 W. obtained a divorce in the courts of Massachusetts and an order for permanent maintenance at the rate of $14 a week. H. cross-petitioned for divorce in the same proceedings. H., after paying maintenance in accordance with the order for two years, returned to Cornwall in 1926. W., who had remained in the United States, now claimed £987, arrears of maintenance under the Massachusetts judgment for the past six years, not being able by reason of the statute of limitation to claim in respect of any earlier date.
>
> *Held*:
>
> (1) That the judgment for divorce in Massachusetts could not be recognized as valid unless the parties were domiciled there;
>
> (2) That the onus of proving that H. had abandoned his English domicil of origin and acquired a domicil in Massachusetts was on W.: that W. had failed to prove this, having given no evidence to show that H. did not retain *animus revertendi*: further, the fact that the house in Cornwall was not sold till 1929, after H. had returned, was against the abandonment;
>
> (3) That the fact that the Massachusetts courts only claimed jurisdiction to dissolve marriages of persons domiciled in the state, did not prove domicil seeing that, where the parties were resident there and neither party disputed the jurisdiction on the ground of domicil, the courts there (as might happen in England) might grant a divorce on the assumption that they were domiciled in the state, although it might subsequently turn out that they were not so;
>
> (4) That H. had never lost his English domicil and the divorce (even if as a final order it had the effect of dissolving the marriage in Massachusetts) was a nullity in England as being granted by a court which was not competent;
>
> (5) That, although the order for maintenance was a judgment *in personam* against H. who had submitted to the jurisdiction (and not, like the divorce, a judgment *in rem*), and although there was authority ([1924] 1 K.B. 807) that orders for maintenance made in foreign divorce proceedings which (unlike those made by the Divorce Court in England) are final orders, can be enforced in England by action on the foreign judgment, nevertheless this order, being consequent upon and dependent on the decree (void in England) for divorce, must be held to stand on the same footing as the decree.

The judgment in this case applies familiar principles of English private international law. The decision that the order for maintenance must suffer the same fate as the decree for divorce follows *Papodopoulos* v. *Papodopoulos*,[1] a case discussed in a previous number of the *Year Book*.[1] Nevertheless, when a foreign court has exactly the same rule with regard to jurisdiction as the English courts and assumes jurisdiction in circumstances where an English court would assume it and grants a decree which is final and unquestionable in its own country (as an English decree would be in England), even if there turned out later to be a strong reason for holding that the court had been misled as to facts justifying jurisdiction, it must strike most people as being unsatisfactory that the decree should be held to be void in England. One may ask whether in such a case the English courts should not presume that the foreign court had jurisdiction and place the onus of proof in the question of domicil on the party who denies that jurisdiction—especially when that party had so far from questioning the jurisdiction, in fact also asserted it by cross-petitioning for divorce.

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[1] [1930], P. 35.

Case No. 9. In *Hussein* v. *Hussein* (54 T.L.R. 632) a decree of nullity of marriage was granted in respect of a marriage celebrated in England, where the domicil was Egyptian. The ground of the decree was duress, i.e. absence of proper consent by the wife to the marriage, she having gone through the ceremony under the threat that the husband would kill her if she did not. In cases of nullity the English courts accept (and admit) a jurisdiction based on the place of celebration (*vide B.Y.B.I.L.*, 1932, p. 171) except where the decree is based on a ground such as impotence which renders the marriage voidable at the suit of one party, but not void. But *quaere* is not duress another such ground? This was a hard case. Apart from the fact that the wife might have found it difficult to obtain a sympathetic hearing in the courts of the domicil (Egyptian Moslem Courts), it would appear, unless and until the *Hammersmith* marriage case ([1917] 1 K.B. 634) is overruled, that the English courts would not have recognized any decree by them on the ground that a monogamous marriage cannot be dissolved by a decree of courts administering a polygamous marriage law.

Cases Nos. (*10*) *and* (*11*), *Finska Angfartygs, &c.* v. *Baring Brothers* (54 T.L.R. 1031) and *Russian-English Bank* v. *Baring Brothers* (54 T.L.R. 1035), are two decisions of the Court of Appeal, delivered on the same day, both rejecting claims by way of assignment, alleged to have been effected in Russia by Departments of the Imperial Russian Government during the War, of sums standing to the credit of that government with the defendants, their bankers in London, in what was known as the "Compte Speciale", a sterling fund created by the payment by the Government of the United Kingdom into the account of sums in sterling in exchange for Russian treasury bills. This account was used for payments for war supplies by the Russian Government when they had to be made in foreign currency. In both cases the plaintiffs proved that debts were due to them from the Imperial Russian Government and that certain steps in the complicated machinery of the Russian Government had been taken, which, if they had not been left uncompleted owing to the Bolshevik Revolution, would have led to their payment in foreign currency obtained through this account; but in both cases the claim failed because no assignment was proved. Both these decisions come at a late stage of long litigation. The previous history of the *Finska* claim was indicated in the 1938 *Year Book* at p. 249. The earlier history of the *Russian and English Bank* claim will be found in the *Year Book,* 1933, pp. 187 and 189; 1934, pp. 192 and 201; and 1937, p. 224; it involves decisions on all the points to which the position of defunct Russian corporations, with branches in England, has given rise. Both these cases involved the same point of law, namely, what law governs the assignment of a debt or *chose in action.* In both cases the alleged assignment took place in Russia between parties domiciled there and the *chose in action* assigned was in England. In both cases it was held that to be valid the alleged assignment must be valid by Russian law (whether as *lex loci contractus* or *lex domicilii* of parties is not clear); and the question whether it must also be valid by English law, the *lex situs* of the *chose* assigned, was reserved.

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[1] 1931, pp. 179 and 189.

The Court of Appeal, in so holding, professed to be following an earlier decision of the same court in the *Republica de Guatemala* v. *Nunez*,[1] where three Lords Justices unanimously rejected a claim but each on different grounds. The present writer is still of the opinion, expressed in the last number of the *Year Book*, that Dr. Cheshire is right when he argues that the law which governs the validity of a voluntary assignment of a *chose in action* is the proper law of the contract of the *chose* assigned.[2] This "proper law" may often be in fact the same as the *lex situs* of the debt (viz. the residence of the debtor) and its application is not excluded by these decisions but they are now authority, binding until the House of Lords reviews the question, that at any rate the assignment must be valid by the *lex loci contractus* or *lex domicilii* of the parties) as well.

As has often been stated, the rules of English law with regard to the jurisdiction of the English court in ordinary civil actions consist (1) in the rule that the court has jurisdiction wherever the defendant can be served with the writ in England; and (2) in additional rules contained, principally, in Rule 1 of Order 11 of the R.S.C., defining classes of actions in which the defendant may be served abroad. In the cases covered by Rule 1 of this Order, the plaintiff must obtain leave of the court to serve abroad so that the court first decides if the cause of action comes within the rules and also whether the English court is the *forum conveniens*.

Case No. 12. Waterhouse v. *Reid* ([1938] 1 K.B. 743; 54 T.L.R. 332) is a decision of the Court of Appeal reaffirming the principle that, when a plaintiff has obtained leave to serve a writ abroad, he cannot later add, in his statement of claim, a further cause of action—not covered by Rule 1 of Order 11—although it is ancillary to the cause in his writ and in the ordinary way might have been added in a statement of claim.

Case No. 13. Attorney-General v. *Prosser* (54 T.L.R. 933) is another decision of the Court of Appeal which makes another point clear. There are other classes of civil actions in addition to the ordinary civil action *in personam* such as matrimonial causes and proceedings brought by the Crown, both of which classes are governed largely by their own rules of procedure. In the case of actions brought by the Crown for taxation, the original rule was that the court only had jurisdiction when the defendant could be served in England with the originating process—called a subpoena—but section 37 of the Crown Suits Act 1865 gave it jurisdiction when the proceeding was brought against a British subject and the subpoena was served on him abroad. No leave of the court to serve abroad was necessary, but there were other safeguards before the judgment became enforceable. The later rules of Order 11 of the R.S.C. deal with the methods by which English process can be served on persons abroad, and in particular Rule 11 gives the procedure when service is to be made in countries with which civil procedure conventions have been made, under which the foreign authorities permit or assist in the service of the English process. In its original form, Rule 11 (probably by an oversight) only applied to process served abroad *by leave of the court* and therefore was not available in the other classes of actions, such as matrimonial causes and Crown proceedings, where such leave was not necessary. The conventions, however, apply to all classes of process other than criminal, and in order to render the convention process available for these other classes, Rule 11 was amended in 1932 to include process where the leave of the court was not required, and Order 68 Rule 3 provided that "Order 11 should apply, so far as it is applicable, to Crown proceedings". It was argued in this case that the effect of Rule 3 of Order 68 was to make it necessary to obtain the leave of the court to serve Crown process abroad because Rule 3 covered the whole of Order 11, including Rule 1, and under section 89 of the Judicature Act, 1925, power is given to the Rules Committee in matters of procedure to amend Acts of Parliament. This contention was rejected by the Court of Appeal who held, on the construction of the rules, that Rule 3 only made applicable to Crown process the rules of Order 11 relating to the manner in which service of process may be effected abroad, particularly Rule 11 relating to conventions, and this was the meaning of the words in Rule 3 "so far as it is applicable". In the case of matrimonial causes, there is a provision corresponding to Order 68, Rule 3, in the matrimonial causes rules. E.

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[1] [1927], 1 K.B. 669: see *B.Y.B.I.L.*, 1928, p. 183.

[2] *Private International Law*, 2nd ed., pp. 444 *et seq.*

DECISIONS OF AMERICAN COURTS

For many years past the notes on the decisions in the American courts have been written for the *British Year Book of International Law* by Professor James W. Garner, of the University of Illinois. Professor Garner died after a short illness on December 9, 1938, before he had had time to prepare his notes for the Year Book.

A notice of Professor Garner will be found on p. 115 above.

REVIEWS OF BOOKS

Académie de Droit International: Recueil des Cours, 1937. Vols. 59–62 of the series. Paris: Sirey. 3,026 pp.

Vol. I of the *Recueil* contains two interesting essays in international politics. Professor Chinard (*Les Origines historiques de la doctrine de l'isolement aux États-Unis*) traces the germ of the Monroe doctrine, and M. Barthélemy (*Politique intérieure et droit international*) examines with wit and detachment some of the catchwords of those who view international relations from the standpoint of internal ideologies. Both M. Kaeckenbeeck (*La Protection internationale des droits acquis*) and Mr. Feinberg (*La Juridiction et la jurisprudence de la Cour permanente de Justice internationale en matière de Mandats et de Minorités*) devote part of their lectures to the position of minorities. M. Kaeckenbeeck's account of the work of the Arbitral Tribunal of Upper Silesia during his presidency is to be noted. M. Dumas (*La Sauvegarde internationale des droits de l'homme*) sees the beginning of an effective international standard of conduct in the steps taken by states to protect their citizens abroad, but he distinguishes the rights of man from the rights of minorities. In Dr. McNair's course (*Les Effets de la guerre sur les traités*) the section on capitulations is of especial interest. M. Efremoff outlines his plan for some permanent machinery of conciliation as the only alternative to war against aggression (*Organisation de la conciliation comme moyen de prévenir les guerres*).

Vol. II opens with a sketch by M. Dupuis (*Les Antécédents de la Société des Nations*) of the main projects for an international organization for the prevention of war from Sully's Grand Design to the "Universal Union" of Alexander I. The effects of marriage upon the nationality of the wife and the problems of conflict of laws arising therefrom are the subject of M. Makarov's lectures (*La Nationalité de la femme mariée*). The theory and practice of diplomacy are represented by M. Wolgast's study of *Le Diplomate et ses fonctions*, with a bibliography of 599 works. Students of comparative law will welcome the statements of Moslem law given by M. Rechid (*L'Islam et le droit des gens*), and M. Cardahi (*La Conception et la pratique du droit international privé dans l'Islam*). M. Sauser-Hall looks in vain for some firm footing in the treacherous sands of gold-clause law outside the decisions of the Permanent Court and of the Dutch High Court (*La Clause-or dans les contrats publics et privés*).

Two of the courses in Vol. III are concerned with the League of Nations. M. Rappard (*Le Nationalisme économique et la Société des Nations*) traces the efforts of the League to counter economic nationalism up to the abortive conference of 1933. The problem, as he sees it, is to find a way of giving effective representation to peoples as opposed to governments. M. Andrassy also (*La Souveraineté et la Société des Nations*) has no difficulty in showing that membership of the League leaves state sovereignty unimpaired. M. Bonnet supplies a much-needed review of the work of the International Institute of Intellectual Co-operation, and M. Morelli investigates the nature of the international judicial and arbitral process. M. Walz (*Les Rapports du droit international et du droit interne*) expounds the dualistic or pluralistic theory, more fully set out by him elsewhere. He shows that, however regrettable it may be ideally or impossible logically, the theory has not been without support in international as well as in municipal courts. M. Allix (*La Condition des étrangers au point de vue fiscal*) discusses the problems involved in taxation of foreigners from the point of view of the principle of economic allegiance. He regards double taxation as inconvenient rather than as unjust or absurd, and thinks the inconvenience can be removed by a policy of give-and-take expressed through international conventions. Baron van Asbeck (*Le Régime des étrangers dans les colonies*) approaches the question of the condition of foreigners in colonial territories as one possessing a specific character of its own. He points out that the work of consuls in colonies is predominantly political rather than commercial or consular in the ordinary sense.

Most of Vol. IV consists of an admirably readable sketch of the whole field of public international law by Professor Lauterpacht, emphasizing the need for regular international legislation as the only satisfactory instrument of revision and calling for an examination of the methods by which a workable mechanism can be brought into being for the purpose. On the Conflict of Laws the courses of M. de Bes, dealing almost entirely with Continental theories, and of Mr. Llewelyn Davies, giving special attention to the Anglo-Saxon attitude, usefully supplement each other, though Mr. Davies does not agree at all points with "l'École moderne d'Oxford". Finally, there is a course by Dr. Bruns upon the organization and competence of the Permanent Court, which is valuable for observations due to the special opportunities open to one who has more than once acted as a judge *ad hoc*.

J. W. J.

Causes de Nullité de la Sentence Arbitrale en droit international public. By A. Balasko, Docteur en Droit. Paris: Editions A. Pedone. 403 pp. (100 frs.)

This work gained the "Prix Carlos Calvo" in 1937, a prize which is awarded under the auspices of the Institute of International Law. The book deals on a comprehensive basis with the subject set for the competition, as indeed was necessary, for the work that was called for was not only to be *critique* but also *documentée*, and the author therefore quotes textually not merely what the publicists have had to say as to the circumstances and occasions justifying the non-execution of an international sentence but also the conclusions of the various international conferences and societies which have considered the question. He also gives at some length an account of the discussions at the Assembly of the League in 1929 and again in 1931, and in the committees that resulted therefrom, of the scheme for conferring on the Permanent Court of International Justice appellate jurisdiction from international tribunals whose decisions were attacked on the ground that they had exceeded their jurisdiction or for other analogous reasons.

The author divides the grounds on which an arbitral decision can be avoided into two groups: the first—which he describes as *causes statiques*—based on defects in the arbitration agreement, the composition of the tribunal or the formulation of the sentence; the second—which he calls *causes dynamiques*—based on the proceedings of the tribunal. As to the second group, the author's view is that *incompétence* and *excès de pouvoir* are the only matters which need be mentioned in any international agreement which may be concluded on the subject. It is this second group which presents the difficulties: the views of the text-book writers are very diverse, and governments hesitate to commit themselves to any agreement which might facilitate the challenging of arbitration decisions and thereby destroy one of the advantages of international arbitration —the fact that whatever the result it does at least put an end to the dispute.

The author examines the two subjects *incompétence* and *excès de pouvoir* in great detail, and gives the draft of a protocol by which jurisdiction might be conferred upon the Court at The Hague over any dispute in which it is alleged that an arbitral award is invalid on one or other of the grounds mentioned. He also annexes a study of several arbitrations in which questions as to the invalidity of the proceedings have been raised in order to illustrate the contents of his arguments.

In the concluding chapters of the book the author examines the stipulations of various international instruments which have provided for the re-examination of an arbitral award, either by way of revision by the same tribunal on the ground of the discovery of new facts, or by way of appeal to another tribunal, particularly Article 10 of the Paris Agreement of April 28, 1930.

The wealth of material which the author has collected and on which his study of the subject is based renders this book a valuable contribution to the literature of international law. It is to be hoped that similar success may attend the encouragement to the study of other topics afforded by the foundation of these prizes under the auspices of the Institute of International Law.

C.

Diritto Internazionale Pubblico. By G. Balladore Pallieri. 1938. Milano: Guiffré. xvii+548 pp. (Lire 50.)

It is barely a year since I was asked to review the first edition of this book, of which a second edition is now before me. This is not a mere reprint. With admirable industry the author has now produced an entirely new edition revised and improved throughout. As the author states in his preface to this edition, he has availed himself of the suggestions made by some of his colleagues or by some of the reviewers of the first edition. The author has greatly improved one of the most important parts of his work—that relating to the international protection of what he calls "simple interests". In my view, the undertone of all this part is more legal in character than it was in the first edition.

I note with satisfaction that the author—in dealing with the various attempts recently worked out to make war illegal—has in this edition omitted some expressions to which I called attention in my previous review. But it would be idle to disguise that I would have preferred a still more legal treatment of this difficult subject, the more so as the author is fully aware of the importance of the legal character of the body of rules which is styled "international law".

His was not an easy task, but, I think, it would have been simplified if the author had been convinced that the use of force by one state against another is *illegal*, unless attended by some *legal* justification.

If the conception of war were based on this footing, then there would be no need to define "aggression"—a term which is more political than legal. It would be sufficient to define "self-defence"—a legal term common to every legal system—which should be considered as the primary exceptional case in which force is justified. A most important contribution not only to the law of nations but to civilization itself will be made by the man who succeeds in defining clearly and precisely the term "self-defence".

The student, who is accustomed to find so great a help in the excellent analytical index which is invariably appended to an English legal book, must still hope that a far more copious table of reference in alphabetical order may be added to a third edition of this work.

GUISEPPE M. PALLICCIA.

Le Conflit des Lois en matière de Contrats. By Jean P. Barbey. 1938. Paris: Librairie Arthur Rousseau. xix+359 pp.

The object of this treatise, published under the auspices of the Paris Institute of Comparative Law, is to compare the American, English, and French rules governing the question of conflicts of the law of contract. A considerable portion of the book is devoted to a description of the relevant rules, but certain of the author's conclusions are of interest to Anglo-American lawyers. He points out that English law comes much nearer to French than to American law in this particular field owing to the fact that the American rules are designed to deal with local conflicts of an interstate character rather than with conflicts on the international plane. Hence the territorial character of the American rules is more strongly marked and so far as Contract is concerned appears to be firmly based on the principle of *locus regit actum.* He suggests that the gap between the English and French rules is largely due to divergent views on the question of capacity and that this gap is gradually closing as the result of the growing tendency of the French courts to break away from the conception of a personal status founded on nationality. His general proposition, which is, perhaps, unduly optimistic, is that the rules of conflict in all countries are gradually becoming assimilated in response to the urgent needs of commerce and that this movement towards "universalism" is based on case law rather than on the conclusions of text-book writers. There is little doubt that in France the influence of *jurisprudence* has been considerable in this direction. A large number of French and American decisions are examined by the author, but, curiously enough, very few English cases are cited. This may be due to a difficulty in gaining access to the English Law Reports or more probably to the fact that the discussion of the English case law by Dicey and Cheshire seems to have been regarded by the author as being sufficient to preclude any need for further criticism.

A very valuable feature of this book is the introduction by Professor Levy-Ullmann which outlines his views as to the place occupied by the doctrine of "Universalism" in private international law. Shortly stated, this doctrine implies that there is a tendency constantly at work in the realm of the conflicts of law which is gradually producing assimilation of the rules of the different systems of conflict. He bases the doctrine on three grounds. First, there is the historical element, i.e. the fact that the rules of conflict are in the main derived from a common source and have developed along parallel lines. Secondly, we have the rational element which he describes as the imperative need for rules which shall resolve conflicts in the same way in all countries. Finally, there is the positive element, i.e. the existence in all systems of law of such common principles as those of respect for acquired rights, of the territoriality of immovables and the extra-territorial character of the personal law of the individual. The doctrine of universalism appears in substance, however, to amount to little more than a plea for a variation of the present ultra-nationalistic character of all systems of private international law. It is impossible not to sympathize with this point of view in view of the present chaotic state of the rules of conflicts of law and jurisdiction throughout the world, even if the signs of the times appear, at the moment, to point in the opposite direction. In the meantime research of the kind which has produced this lucid and closely reasoned treatise should be encouraged and supported in every possible way.

H. C. G.

Essai sur la fraude à la loi en Droit Musulman. By Jean Baz. 1938. Paris: Recueil Sirey. vii+402 pp.

This thesis embodies the results of a course of postgraduate study pursued in the University of Lyons by a Libanese graduate of the School of Law at Beirut. The author examines the extent to which the theory of the abuse of rights and the doctrine of evasion of law can be traced in the Mohammedan system. Incidentally he also discusses the question whether Muslim law recognizes the existence of rules of conflict. The book concludes with a comparative study of the rules of modern law which are designed to prevent evasion. The thesis is attractively written and though it is, perhaps, lacking in profundity, it is nevertheless an interesting contribution to knowledge of a somewhat obscure subject.

H. C. G.

Die Panamerikanischen Friedenssicherungsvertraege. By Heinrich Berner. (Neue Deutsche Forschungen, Vol. 190.) Berlin: Junker und Duenhaupt Verlag, 1938. 242 pp.

A good introductory sketch contains a general résumé of the efforts of American States at co-ordination and securing peace, down to the war of 1914. In the main, the book is a descriptive study of the efforts to secure peace made in the course of the Pan-American Conferences of the post-war period, from the Santiago Conference of 1923 to the Buenos Aires Conference of 1936. A conscientious and enlightening description of the juristic problems and proceedings involved is supplemented by some information concerning the trends which resulted in the singular evolution—and limitations—of Pan-Americanism.

The author is right when pointing out the fragmentary and "cautious advance" characteristic of these efforts: sincere desire for international progress blends here with a jealous safeguarding by each of the twenty-one republics of its freedom of action; the search for legal or equitable solutions—with a noncommittal attitude on any important issue; the tendency to achieve freedom from far-away Europe with that of achieving freedom from one another. While the author does not analyse the bearings of this state of mind on the procedure adopted, one might find that the predominance in the Pan-American scheme of loose forms of mediation over the submission of disputes to solution on the basis of equity or strict law springs precisely from this desire to avoid commitments at long range. The same explanation might account for the very insufficient crystallization of an organized Pan-American attitude toward such important aspects of international law as the relationship of third parties toward belligerents or the relationship of American states toward inter-continental machinery for the enforcement of peace.

While the "cautious advance" method adopted by the American republics does not possess sufficient impetus to render it a real force in international relations, unless it is radically modified, it is true, as Mr. Berner points out, that the machinery of Pan-Americanism has indeed better chances to survive the present critical period than have other systems which play a *va-banque* game of peace enforcement.

Towards the end of the volume the author indulges in a bit of gratuitous name-calling in the direction of the League of Nations. If this is disregarded, there remains a good, serviceable description of the work of the recent Pan-American Conferences. The latest Conference, held in Lima in December 1938, did not change the picture essentially, and did not interfere with the usefulness of the present study.

The volume contains no index, but has a list of ratifications and accessions to the relevant peace-preserving conventions.

BENJAMIN AKZIN.

The Jurisprudence of the General Claims Commission, United States and Mexico. By Dr. J. G. de Beus. The Hague: Martinus Nijhoff. xi+342 pp. (6 florins.)

Under a convention signed at Washington on September 8, 1923, provision was made for the establishment of a commission to adjudicate on all the claims which had arisen since July 4, 1868, between American nationals and the Mexican Government and between Mexican nationals and the Government of the United States (other than claims growing out of the revolutionary disturbances in Mexico, which were made the subject of a separate convention and submitted to a special commission). In the present volume a critical study is made of the conclusions reached by the General Commission.

The Commission had a somewhat chequered career. Altogether 3,617 claims were submitted to it. Article 6 of the convention setting up the Commission provided that all the claims submitted to it were to be decided within three years from its first meeting. The time was hopelessly inadequate. Twice an arrangement was come to between the two governments prolonging the Commission's life, but even with these extensions only 148 claims were finally decided, leaving 96 per cent. of the Commission's work undone. At the end of the second extension the Commission expired owing to internal squabbling, and the two governments were left to try to find some better method of settling the claims. Nevertheless the Commission left behind it a series of decisions many of which are of great interest from the point of view of international law, particularly those which were rendered during the period when Professor Van Vollenhoven of Leiden was the President of the Commission.

Dr. Beus's purpose in preparing the volume is to render these decisions more accessible. Three volumes have been published by the Government Printing Office at Washington which constitute the official record of the Commission's work. A. H. Feller, of the United States Attorney-General's Department, has published a book, *The Mexican Claims Commissions*, containing an account of the working of the series of commissions set up to deal with the claims between Mexico and other states (there were altogether seven such commissions), but the part attributed to the U.S.-Mexican General Commission was not long. Mr. Nielsen also has published a volume, *International Law applied to Reclamations*, consisting mainly of decisions or opinions rendered in cases before the commission of which he was the author. There was, therefore, scope for a critical study of the Commission's decisions.

The author's effort has been to present a logical commentary on the decisions, avoiding textual quotation of unimportant passages and arranging his chapters so as to give a coherent but critical picture of the Commission, its origin, its jurisdiction, the qualifications of claimants, and its handling of particular subjects, especially the more important ones such as the decisions in claims involving the interpretation of a Calvo Clause.

The Commission suffered—as so many other claims commissions have suffered—from having to work on the basis of an ill-drawn convention, by no means easy to interpret; decisions mainly concerned with the interpretation of this convention are not of much permanent interest; nevertheless Dr. Beus's volume constitutes a valuable addition to the literature relating to forensic efforts to determine the responsibility of states.

For a book written in English and printed and published abroad the volume reflects great credit on all who were responsible for its production. Mistakes are few and far between.

C.

The Law of Nations: Cases: Documents: Notes. Edited by Herbert W. Briggs. Cornell University. G. G. Harrap & Co., Ltd. xxix+984 pp. (21*s.* net.)

If a student emigrated to a desert island in order to give himself the time to read up the subject of international law and were allowed to take only one book with him for the purpose, the subject of the present review would be a very good book to take. The amount of learning which the volume contains is immense.

As Professor Briggs very truly remarks in his preface, public international law is probably best taught by the case method, but the student needs more than cases. The author's endeavour has therefore been to present the student in a handy form with the other material which he needs as well as with a selection of cases. Take, for instance, the section dealing with the Sources of the Law of Nations: in it the author groups the text of Article 38 of the Statute of the Permanent Court of International Justice, setting out the law which the Court is to apply in deciding the cases brought before it; the decisions of the Supreme Court of the United States in the *Scotia* and the *Paquete Habana*; Lord Alverstone's decision in the *West Rand Central Gold Mining Co.* case; and Chief Justice Marshall's decision in *Thirty Hogsheads of Sugar*; and the British-American Arbitration Decisions in 1923 and 1926 in the cases of the *Eastern Extension Telegraph Co.* claim and the *Cayuga Indians* claim. These are followed by an "Editor's note" as to the confusion produced by the loose way in which writers use the word "sources", meaning thereby four quite different things. The author very wisely explains the sense in which the word ought to be used. This note then summarizes the teaching of the various groups of international lawyers (Positivists, Naturalists, and Monists) on this subject of "sources" and the part played by treaties and by custom as sources of international law. This account of the section dealing with sources of international law is sufficient to show that Professor Briggs puts into it material of the type which a teacher who was in close touch with his students would be almost certain to use for the purpose of a lecture on the subject.

The same method is followed throughout the book. There comes first in each section a selection of judicial decisions intended to illustrate the topic, and this is followed by an "Editor's note" expounding what the author believes to be the present state of the law on the subject, with explanations of the teaching of the various schools of thought, and of individual publicists with regard to it.

The selection of the cases used to illustrate the law in each section must always be a matter of individual appreciation. Professor Briggs shows a not unnatural bias in favour of American decisions—particularly those of the United States Supreme Court. They are the decisions which would appeal most to the students by whom his book is likely to be most largely used, but the choice of cases has been well made.

The book should prove to be one of great value to students; still more so, perhaps, to those who are responsible for teaching international law, and who, as such, are obliged from time to time to examine the contents of their own lectures in order to make sure that they are dealing with all the topics which require treatment, if their lectures are to keep abreast of modern teaching.

C.

Premier Congrès d'Études Internationales, 1937. Paris. Les Éditions Internationales. 471 pp.

The volume contains the record of proceedings at the congress organized in 1937 by the Association of International Studies under the patronage of the "Institut des Hautes Études internationales" of the University of Paris. The Association consists of former students and members of the "Institut', and it was these old students of whom the congress was in great part composed. It met for a week in Paris at the end of September. It is symptomatic of the interest taken in England in international law that not a single Englishman appears to have been connected in any way—honorary or active—with the meeting.

The volume contains much that is interesting, more particularly because the gathering was mainly composed of the younger men and because the proceedings reflected the ideas that are pulsating through their minds, ideas which are markedly different from those which prevailed among the international lawyers of five and twenty years ago.

The Congress worked in three sections: the first dealing with questions affecting the humanitarian side of international law such, for instance, as the protection of minorities, the protection of historic monuments and works of art in time of war, the right of asylum, the status of refugees or the movement for the protection of the civil population in time of war. The second committee dealt with economic questions, such as monetary questions, customs questions, problems of raw materials and banking questions, &c. The third committee dealt with the future of international law, discussing subjects such as the codification and the evolution of international law, its relation to constitutional law, principles governing state responsibility, the problem of rendering international law effective and realizable, &c.

The volume contains the text of the various reports submitted to each committee by individual members, reports which reflect merely the views of the authors, and the reports of each committee containing the conclusions reached by the committee after the discussion of the individual reports.

It is the work of the third committee that is the most interesting. It was there that what one may call the modernists of international law found scope for their activities. The report of M. Kopelmanas, the reporter of the committee, is a striking document and has the merit of being quite short. The remarkable thing about this meeting was that its members could agree. The Congress was content to recommend general principles; it did not attempt the formulation of detailed rules; and the recommendations put forward by the various committees were all unanimously adopted at a plenary session of the Congress.

C.

Constitutions of All Countries. Vol. I. *The British Empire.* His Majesty's Stationery Office. vii+678 pp. (10*s.* 6*d.* net.)

This is the first volume of a compilation made by the Foreign Office and published by the Stationery Office of the constitutions—so far as written constitutions exist—of all countries. This first volume relates to the countries within the British Empire. A second volume is envisaged which will contain the constitutions of continental European countries and their dependencies. In the present volume documents—whether Acts of Parliament, Orders in Council, Letters Patent, Royal Instructions, or Ordinances—are printed either as extracts or in full, relating to sixty-eight countries within the Empire, and in addition information is given as to where the constitutional instruments relating to a particular territory may be found where the instrument depends for its authority upon some Dominion enactment, as in the case of the Australian Pacific territories, or where the printing of the text would involve the repetition of some other text already printed, as in the case of some of the West African Orders in Council. The complete text of the documents which are included is not as a rule printed: only the important provisions are given in full. One trembles to think what the size of the publication would have been if every constitutional document had been printed *in extenso.*

The volume constitutes a mine of information as to the legal basis of the various units of the Empire. Without it few people would have known where to turn to for information as to how the Cayman Islands are governed, or how the administration of Fakofu, Nukunono, and Atafu was concentrated in the hands of a single administrator.

The British Empire is a complex organism. It seems that the constitution of even an individual Australian state is drawn from seven diverse sources: Imperial statutes, Letters Patent and Instructions to the Governor, general English constitutional law, Federal statutes, State statutes, legal decisions, English and local constitutional convention.

Not only is the volume intrinsically valuable. It is well printed on good paper and published at a very moderate price.

C.

Some Aspects of Religious Liberty of Nationals in the Near East. By Mrs. Helen Clarkson Miller Davis. New York: Harper & Brothers. 1938. xviii+182 pp.

This small volume contains a collection of documents and extracts from documents bearing on the subject of religious liberty and toleration in the states that have arisen in the Near East since the Great War. The documents were collected in connexion with a study of various problems which Mrs. Davis made in Syria and the other countries of the Eastern Mediterranean on behalf of the Religious Liberty Group in the United States. The text of the various documents and extracts is preceded by a fifty-page summary of the effect of the documents and of the conclusions which Mrs. Davis reached as the result of her investigation of the subject on the spot.

Paper guarantees of freedom of conscience, of religious equality, and of toleration seem, on the whole, to be satisfactory and adequate; but guarantees embodied—perhaps one should rather say, embedded—in constitutions or legal enactments are in some countries in advance of the mental attitude and outlook of the majority of the people, and where that happens the guarantees for religious freedom are apt to prove in practice to be illusory.

It is surprising to learn how little specific provision has been made for the recognition of the right of any individual to change his or her religion. The Albanian Minority Declaration of October 2, 1921, is the only international instrument which unequivocally recognizes such a right; in Iraq it depends on the wide scope of an enactment which recognizes the right of every individual to the free exercise of "any" creed or religion. In other countries, also, the right depends on interpretation rather than on specific enactment. Sometimes the right to become a Mohammedan is provided for but not the right to become a Christian.

Mrs. Davis is silent—perhaps wisely so—as to the extent to which the work of the Christian schools and colleges in the Near East is hampered by the lack of machinery for enabling students to secure local recognition of their abandonment of Islam and their adoption of the Christian faith.

Mrs. Davis's general conclusion is that public opinion is moving in the direction of less intolerance as regards religious liberty, and that the present position is not unsatisfactory. Her volume makes an interesting study.

C.

L'Évolution de la Jurisprudence Française en matière de Conflit des Lois depuis le début du XX^e siècle. By Jacques Donnedieu de Vabres. 1938. Paris: Recueil Sirey. 781 pp.

This magisterial treatise of 800 pages is an important contribution to the contemporary literature of private international law. It is a sequel to an earlier work under the same title by Professor H. Donnedieu de Vabres which was published in 1905 and dealt with the development of the rules of conflict by the decisions of the French courts during the nineteenth century. The analysis of French case-law is carried on by the volume now under review from 1900 to the present day.

The French rules of the conflicts of law and of jurisdiction are largely the creation of the Court of Cassation. The French courts have taken a more realistic view of the problems presented to them than that adopted by the text-book writers, and this has given to the law a width and flexibility which it would not otherwise have possessed.

M. Donnedieu de Vabres traces this process not only in sequence but also in regard to its influence on the various topics which are comprised under the heading of conflicts of law. Space does not permit of allusion to more than a few of the more interesting questions which are dealt with in this volume. Most important of all is the movement away from the theory of personal rights based on nationality and the trend towards a regulation of questions of status by reference to the domicil. How far this movement is permanent is a matter for speculation, but it has had very important consequences, notably in the case of conflicts of the law of marriage and divorce and in questions of capacity. On the whole the application of foreign law in cases of conflict has been paralysed, to some extent, by the overriding influence of such doctrines as those of *ordre public*, evasion of law, and the predominance of national interests. The doctrine of the predominance of national interests has, in particular, been utilized for the protection of the rights of contracting parties of French nationality. Of special interest to English readers are those sections of this treatise which deal with the troublesome questions of Renvoi and of Qualification. The theory of Renvoi is defended on the ground that "it secures the co-operation of different systems of private international law". The settlement of the problem of Qualification by the application to every case of the *lex fori* is rejected, but the learned author goes no further than to approve of the empirical solutions of the French courts on the ground that the problem is, in effect, insoluble.

The book is a somewhat difficult one for a reader who is not acquainted with the structure and the terminology of French law, but it is nevertheless indispensable to those who wish to make a serious study of the rules of Conflict in a comparative sense. M. Donnedieu de Vabres is to be congratulated on the admirable manner in which he has discharged a task of very great complexity and difficulty.

H. C. G.

Air Law in the Making. By Dr. D. Goedhuis. The Hague: Martinus Nijhoff. 1938. 8vo. 36 pp. (Gulden 0.80.)

This short book, prepared as an inaugural address, is a review of the international legislation dealing with air navigation and transport. The legislation consists, in the sphere of public international law, of the Air Navigation Convention signed at Paris in October, 1919, and ratified or adhered to by 32 states, and of the Convention on Commercial Aviation for the Americas signed at Havana in February, 1928, and ratified by 12 states, of whom 9 are in Central America. Private international legislation comprises at present four conventions, of which only two are as yet in operation, the five ratifications necessary to bring the others into force not having yet been deposited. The four conventions are those signed at Warsaw in 1929, on the liability of air carriers for loss or damage to passengers or goods; the two, signed at Rome in 1933, on the liability of air operators for damage to third parties on the ground, and on the precautionary arrest (*saisie conservatoire*) of aircraft, respectively; and that signed at Brussels in 1938 (September) on assistance and salvage of aircraft at sea. The first and third are in operation. Dr. Goedhuis has some acute criticisms to make, notably on Article 15 of the Convention of 1919, and his book is a useful recapitulation of the existing international law on this subject.

J. M. S.

Transactions of the Grotius Society. Vol. 23. Papers read before the Society in the year 1937. Sweet & Maxwell. pp. xxiv + 219. (10*s.* net.)

The annual volume of the Grotius Society always contains matter of interest to students of public and private international law. The present issue includes nine papers dealing with the following subjects: "Federating as a Motive Power towards Peace", by Dr. Joost van Hamel; "Some Features of Hungarian Private International Law", by Dr. Ch. Szladits; "The Frailty of Alliances", by

Dr. L. P. Jacks; "International Loans and the Conflict of Laws", by Dr. Martin Domke; "The Organization of International Justice, Justiciable and Political Disputes, and the Prospects thereof", by Megalos Caloyanni; "Some Legal Aspects of the Mandate System", by James C. Hales; "A Plea for an Imperial Privy Council and Judicial Committee", by Edward F. Iwi; "An American Challenge to International Anarchy", by Georg Schwarzenberger; "Recognition of Belligerency and Grant of Belligerent Rights", by Wyndham Legh Walker.

One of the most interesting papers is Professor Iwi's, which raises a number of complex constitutional questions and advocates far-reaching changes in the machinery for the exercise of the Crown's appellate functions as head of the now equal members of the British Commonwealth of Nations. Mr. Legh Walker makes a strenuous plea, supported by a wealth of historical illustration, for the view that the powers are under a legal obligation to grant full belligerent rights to both parties in the Spanish conflict.

A. P. F.

An African Survey. By Lord Hailey, G.C.S.I. Oxford University Press. London: Sir Humphrey Milford. xxviii+1837 pp. (21*s.*)

This great work owes its origin to the suggestions made by General Smuts in the Rhodes Memorial Lecture at Oxford in 1929 as to the need of a general survey of the situation and methods of government now being followed in all the different African countries south of the Sahara. As General Smuts saw the position, these countries were being developed under the control of different European powers and divergent and often conflicting principles were being applied in their administration. As the result of the lecture a committee was formed under the auspices of the Royal Institute of International Affairs to carry into execution the project of such a survey. Money was given by the Carnegie Corporation of New York, and by the Rhodes Trustees; and Lord Hailey, then about to retire from the Indian service, agreed to undertake the directorship of the survey.

After nine long years of research and collaboration the survey is given to the world. The field covered is immense. After a general description of the physical features of Africa, a review is given of the native inhabitants, their languages, estimates of the numbers and trend of the native population, the systems of government, the administration of justice, the systems of taxation, the varying policies as regards the association of the natives with the government of each area, the problems of labour, the policy as regards land-holding, agricultural encouragement and research, forests, water-supply, public health, education, economic development, mining, transport, and communications. What a task! And that for a territory of between five and six million square miles, parcelled out among some twenty different governments. The wonder is that so far-reaching a survey should have been accomplished in the time. Of the need of it no doubt can be entertained. The frontiers between the various African colonies and territories consist in the main of arbitrary lines drawn by man; but seldom do they consist of natural features constituting an obstacle to the passage or migration of the native races. The frontiers therefore cut across the types of native inhabitants, and a knowledge of the reactions of the natives to the varying governmental policies pursued in the different states in matters affecting the daily life of the native must necessarily be of importance to those who are responsible for the administration of any given area. However greatly the circumstances of one colony may differ from those of another, a knowledge of what has been tried elsewhere and of the measure of success it has attained must be valuable to the official confronted with the problems of government, even if the district which he is administering be small.

Apart from questions of treaty interpretation, the difficulties involved in the administration of these African territories are not those which concern the international lawyer, but no one can study the volume without feeling admiration for those who have coped with so great a task. One can only venture to express the hope that means may be found of keeping the survey up to date. It will need it, for the situations and policies described are constantly changing.

C.

International Legislation. A Collection of the Texts of Multipartite International Instruments of General Interest. Edited by Manley O. Hudson with the collaboration of Ruth E. Bacon. Vol. VI, 1932–4, Nos. 304–401. Washington: Carnegie Endowment for International Peace. 1937. xli+986 pp. ($4.)

The sixth volume of *International Legislation* will be received by international lawyers with the same grateful appreciation as its predecessors. These volumes have now become more than an indispensable instrument of work and research for the expert. Their range and method of presentation are such as to provide a stimulus for further study of international law to the beginner and the layman if they are fortunate enough to come across the volumes of this collection. They show the variety and the vitality of international relations in a world in which political retrogression tends to obscure the reality of the interdependence of states. It is for reasons of space impossible to enumerate the conventions reproduced in this volume; and it would be doing less than justice to the thoroughness of Judge Hudson and his collaborators to single out some of them for the purpose of illustration. They range from widely ratified conventions, like those relating to postal communications, transit, and broadcasting (which, together with the international labour conventions, occupy the bulk of the volume), to that pathetic Equal Rights Treaty consisting of one substantive article and providing that "upon the ratification of this treaty men and women shall have equal rights throughout the territory subject to their respective jurisdiction". The treaty was signed by some American States in 1933, but no ratification had been deposited by January 1, 1937. It would not in any way be indicative of the contents of the volume to mention specifically instruments like the Regional Arrangement concerning Maritime Radio Beacons of July 8, 1933, or the Agreement for the International Tin Control Scheme of October 27, 1933, or the Convention for the Unification of the Methods of Sampling and Analysing Cheeses of October 12, 1935 (it is somewhat terrifying to notice that the Permanent Court of International Justice is, in the last resort, entrusted—in Article 4—not only with the task of interpreting the clauses of the convention but also with deciding disputes arising out of the practical difficulties connected with its application). But these, and similar conventions, bear impressive testimony to the wide range of the collection, which includes most, if not all, general treaties in matters of political, economic, humanitarian, and scientific co-operation. On occasions the Editor has included treaties of a local nature but of general interest like the Convention concerning the Preservation of Plaice in the Skagerak, the Kattegat, and Sound.

The volume is preceded by an illuminating preface written by Judge Hudson and drawing attention to some interesting questions of terminology and procedure in the conclusion of general treaties. The bibliographical references and information concerning ratifications and adhesions have now become a prominent feature of the series which enhance considerably its usefulness. Possibly the learned editor may consider the issue, at some future time, of a supplement bringing up to date the information contained in these items, especially in the latter. The publication of this series is made possible by the Carnegie Endowment for International Peace and by the Bureau of International Research of Harvard University and Radcliffe College. Every international lawyer must feel under a deep obligation to these bodies and to Judge Hudson and his collaborator.

H. L.

International Sanctions. Oxford University Press. London: Sir Humphrey Milford. x+247 pp. (12*s.* 6*d.* net).

This volume on International Sanctions embodies the report of a group of members of the Royal Institute of International Affairs appointed in 1935 and reappointed in 1936 to study the working of the system of economic boycott, as envisaged in Article 16 of the Covenant, in the light of the experience gained from the attempt by the Members of the League to enforce sanctions against Italy after her invasion of Abyssinia. The report is a very thorough piece of work and reflects great credit on all those who took part in the investigation of the subject. It discusses in turn the meaning of the word sanctions, the various ways in which pressure can be applied, viz. diplomatic or moral pressure, the prohibition of exports to the state affected, the arms embargo, the oil embargo, financial sanctions, the prohibition of imports from the state affected, and finally military sanctions. Then comes a series of chapters dealing with some of the larger problems involved: the feasibility of an international force as a means of coercing a covenant-breaking state, the part that public opinion in a democratic state plays, and must play, in any system of exerting pressure by economic means, the attitude of the United States, and the standpoint of the Dominions.

Taken as a whole the general effect of a study of the report is depressing. The theory underlying Article 16 of the Covenant was so good and so simple. Absolute isolation for the covenant-breaker, said President Wilson, a boycott—no "but" and "if" about that in the Covenant—automatic—no goods—no communication of any kind; the most complete boycott ever conceived in a public document; but unhappily an idea more easily conceived than executed. Based upon the postulate of the universality of the League and upon the willingness of all its Members to bear the inevitable losses that the maintenance of such a boycott in order to uphold the *status quo* must impose upon themselves, the system was assumed to be invulnerable. But the world conditions in which for the first time an attempt was made to enforce the system were very different, and it is small wonder that the success that attended the effort was not complete.

Many interesting points come to light in the pages of the book: the growth in the United States exports to, and imports from, Italy of the materials that were important in time of war despite the effort of the Administration to keep the trade down to normal figures (pp. 163–4); the failure on the part of the authors of the Covenant to realize the psychological effect of imposing sanctions that were merely economic (p. 152); the impossibility except by means of war and victory of preventing a state subjected to sanctions from countering its losses by the repudiation of its foreign obligations (p. 97). All such points will no doubt be carefully studied by the powers that be. Time also will show whether means can be found of making the application of Article 16 effective in the future.

C.

Jus Gentium. Società Anonima Editrice Napolitana, 1938. (Lire 60.)

The full title of this book is *Jus Gentium—Annuario Italiano di Diritto Internazionale.* It appears to be the first volume of an annual publication. Yet there is no Foreword from which its object may be gathered, nor is the Editor's name disclosed.

The book consists of three parts: the first contains nine articles on matters of international law; the second comprises the Italian text of four conventions concluded by Italy in 1937; the third gives a list of monographs and books on international law, public and private, published in Italy during 1937. No comments are offered on the conventions, and no review either of the monographs or of the few books is made.

The book is said to be a first attempt by some young scholars. Whether it may have a wide appeal is a matter which time alone can show. But it seems not irrelevant to observe that what I will call the practical side of a year-book affords room for much improvement.

Giuseppe M. Palliccia.

Creation of Rights of Sovereignty through Symbolic Acts 1400–1800. By Arthur S. Keller, Oliver J. Lissitzyn, and Frederick J. Mann. New York: Columbia University Press. 182 pp. ($2.50.)

This volume represents the results of a very useful piece of research work by three international lawyers at New York. It is a study of the practice between 1400 and 1800 of each of the leading European states as regards the formalities to be observed when their emissaries took possession of territories over seas which could be regarded as *terra nullius* and of which they intended to secure the sovereignty for their governments. The book is based on an examination of such records as were available to the authors, and though they do not claim to have exhausted all the material which might throw light on the subject, enough has been examined to justify the conclusions which the authors reach.

It is interesting to note that as early as 1562 Queen Elizabeth repudiated Portugal's claim to sovereignty over lands which Portugal claimed merely on the basis of discovery. She admitted the claim only to places "wherein the King had obedience, dominion and tribute".

The divergences between the practices of the various states are noteworthy, but not on the whole very profound. No states have regarded the savage inhabitants of a territory as capable of enjoying or exercising sovereignty; only where the natives have advanced far enough along the path of civilization to form something in the nature of a government, like the Maoris in New Zealand or the native rulers in the East Indies, have they been treated as units with which a European state could contract as regards cession of sovereignty; elsewhere the territory is *terra nullius* and the sovereignty must be acquired by taking possession.

No state seems to have claimed that mere discovery, unaccompanied by some act to show that possession was taken of the land, was sufficient to found a title. The practices, however, of the various states as regards the formal acts considered necessary differed considerably. Usually a post or cross was erected with or without the Sovereign's arms, sometimes religious ceremonies were observed, or a formal proclamation made by the leader of the expedition. It never seems to have been the custom to attempt any fixation or declaration of the limits of the area of which possession was taken, and not unfrequently the formal acts were repeated at other spots not far from the first: nor was very close attention paid to the question whether the leader had received explicit authorization to annex lands on his Sovereign's behalf.

The book will form a useful addition to our knowledge on the subject of the appropriation of *terrae nullius*.

C.

Annual Digest of Public International Law Cases, Years 1931 and 1932. Edited by H. Lauterpacht. Butterworth & Co. 464+xlv pp. (40*s*. net.)

This volume, published last July, brings the series of Digests, which begin with the year 1919, down to the end of 1932. Like its immediate predecessor, the present volume is under the sole editorship of Professor Lauterpacht, assisted by a distinguished Advisory Committee and learned contributors from no less than 20 different countries. The Digest comprises some 50 decisions of international tribunals and nearly 200 decisions by municipal courts of various countries involving questions of public international law. The cases dealt with cover the widest possible range of subjects and illustrate once more how large a part the law of nations plays in the day-to-day affairs, not only of governments but of business concerns and private individuals.

The work maintains the high level already achieved in the past—it is unnecessary to say more. A welcome and valuable development is the adoption of the practice of quoting the actual words of judgments wherever possible rather than paraphrasing them.

A. P. F.

The Legal Status of Aliens in Pacific Countries. Edited by Norman MacKenzie, Professor of public and private international law in the University of Toronto. Oxford University Press. London: Sir Humphrey Milford. xii+374 pp. (21*s*. net.)

This is a book with a noble aim. In the words of the learned editor "The whole problem of aliens . . . is probably as old as mankind itself. . . . It is, unquestionably, one of the matters which affect international relations. . . . If we understand the facts in this matter it may be possible to suggest changes which will remove causes of complaint and bad feeling and will make some improvements in the relations between the nations in the Pacific area" (p. 1). As the book consists of only 363 pages covering more than a dozen systems of law (viz. Australia, Canada, China, Indo-China, Pacific Dependencies of Great Britain, Japan, Netherlands India, New Zealand, Philippine Islands, Russia, United States of America), though based on writings of men eminently fitted for their tasks it can hardly be expected that every conceivable problem affecting the alien is dealt with, for any ambitious attempt of this nature would easily cover the whole field of private international law. The book makes no such pretence. It deals rather with problems which raise the question "How far do the rights and duties of the alien differ from those of a national of the country?" Some of these problems are, for political and economic reasons, peculiar to the Pacific countries, because in these countries aliens are not necessarily all governed by the same law. For instance, in Netherlands India "points of law differ between Europeans, natives, and non-native Orientals, whether the persons concerned are Dutch subjects or aliens" (p. 240), and "in the classification of aliens the following are regarded as Europeans:

"(1) all persons of European origin;
(2) all persons of foreign origin who in their own country are subject to a 'family law' mainly based on the same principles as the Dutch family law;
(3) all Japanese nationals." (p. 241).

In China, however, the nationals of certain powers still enjoy what is called "Extra-territorial rights", which in some respects make them a privileged class (p. 110). Even in the United States, where "as a general rule resident aliens, except alien enemies, have the same civil rights in the United States as citizens", the law has in certain cases "limited the rights of specific classes of aliens as against those of other classes of aliens or citizens" (p. 317). Apart from the complexity due to the application of more than one law to a class of persons termed under the generic name "aliens", the problem concerning this class of persons is further complicated by the fact that, for racial and other reasons, nationality in some cases does not necessarily entitle a person to the enjoyment of full citizenship. This aspect of the problem is most complicated in connexion with the law of immigration, to which the book has devoted much space. For instance, "while all Canadian nationals are British subjects, all British subjects are not Canadian nationals; while all Canadian citizens are British subjects, neither British subjects nor yet Canadian nationals are necessarily Canadian citizens, and both, under the terms of the Immigration Act, may be kept out of Canada" (p. 12). As already observed, the book cannot be expected to deal with all the problems concerning aliens in the Pacific countries but, in our opinion, it contains very useful information, particularly for those who, like the editor, wish to know not only what the law is but also what changes may be suggested for improvements in the relations between nations in the area concerned.

CHENG TIEN-HSI.

Diplomatic Correspondence of the United States: Inter-American Affairs, 1831–60. Vol. IX, Mexico 1848 (mid-year)–1860. Selected and arranged by William R. Manning. Washington: Carnegie Endowment for International Peace. 1251+xlv pp.

The task undertaken by the Carnegie Endowment for International Peace is truly monumental, as this ninth volume of the series shows. It contains the more important documents exchanged between the United States and Mexico —diplomatic notes, reports and dispatches from the American Minister in Mexico to his Government, instructions by them to him, &c.—during the years 1848–60. The period covered was one of disturbed relations between the two countries and of revolution in Mexico, and many interesting political and, to a lesser extent, legal questions arose, and are treated here from several different angles. The collection is a mine of information, otherwise unobtainable, for which the historian and research student will owe a heavy debt of gratitude to the Editor and the Carnegie Endowment.

A. P. F.

Diplomatic Correspondence of the United States: Inter-American Affairs, 1831–60. Edited by W. R. Manning. Vol. X. 1938. Washington: Carnegie Endowment. xxxvii+913 pp. ($5.00.)

The tenth volume of Dr. Manning's imposing series covers thirty years of the diplomatic correspondence of the United States with the Netherlands, Paraguay, and Peru. The general character of the work has been sufficiently indicated by notices in earlier volumes of the *Year Book.*

For the most part the documents deal with what may be called the small change of diplomacy, and their main interest will be for the historian rather than for the lawyer. Here and there we come across something which concerns the student of the law of nations. For example, there is the dispute concerning the sovereignty over the Aves Islands, but this does not reach its conclusion in the period covered. In correspondence with Peru we find the United States insisting upon their familiar objections to the Declaration of Paris. Great Britain is plainly accused of an utter lack of sincerity, her only purpose, according to the American Minister in Lima, being "to allure the United States into a yielding up of the right to employ privateers and thus disarm us of the most certain means of checking her preponderance of the ocean" (p. 791).

Among other matters of legal interest may be noted the assertion of the claim to freedom of navigation on various South American rivers, matters arising out of the annexation of Texas, and incidents raising questions of belligerent rights in revolutionary wars.

H. A. S.

The Mediterranean in Politics. By Elizabeth Monroe, of the Royal Institute of International Affairs. 1938. Oxford University Press. London: Sir Humphrey Milford. ix+259 pp. (10*s.* net.)

This book falls within the domain of international relations rather than within that of international law. Nevertheless it is a book which every serious student of international law should read because it gives a vivid picture of the competing national interests in an area where the future tug-of-war may well come.

Miss Monroe writes an attractive study of the present position of each of the three states chiefly concerned with Mediterranean problems: Great Britain, France, and Italy. She gives a penetrating analysis of what the Mediterranean stands for to each of them, of the difficulties confronting each in their respective spheres, their past successes and mistakes, their policies for the present and the future, the advantages and disadvantages resulting from geographical position and economic wealth, the trading possibilities available for each, and the political clouds that rise above the horizon for each in the form of nationalist aspirations on the part of subject peoples.

At the end of the chapters dealing with British, French, and Italian interests in the Mediterranean come two chapters dealing with Turkey and Spain, equally vivid in the picture they give of the situation in those two countries.

Few Englishmen will read the book without being benefited by the rude awakening which may be in store for them from the comfortable assumption that all is well because the British Navy is invincible at sea and a powerful fleet is maintained in the Mediterranean.

The importance to the international lawyer of a book of this kind is that without an understanding of the national policy pursued by each country, it is difficult to understand the attitude which will be adopted by the international lawyers from that country, and the views which they will advance as to any particular problem on which there is disagreement. The breadth of the belt of coastal or territorial waters affords a good example. It is only by a study of the elements in the political situation that the international lawyer can hope to gauge the real importance of the opposition which he finds to the general acceptance of principles which he may himself have been led to believe were established beyond question. A book of this kind should therefore be read by every international lawyer who desires to keep abreast of current problems, even if he feels that its sphere lies outside the strict domain of international law.

The book was written and published before the conclusion of the Munich agreements. What difference to the situation the conclusion of those agreements will make, no one can at present tell.

C.

The Administration of Justice under the Quebec Act. By Hilda M. Neatby, of Regina College, University of Saskatchewan. Minneapolis: University of Minnesota Press; Oxford University Press. London: Sir Humphrey Milford. 383 pp. (27*s.*)

The title of this book is scarcely adequate to give a European reader any clear idea of the field of historical study which it covers.

After the British conquest of Canada in 1763, the Government in London found itself faced with the problem of organizing a system of government—and more particularly of developing the administration of justice—for a population composed of two strangely diverse elements whom circumstances compelled to live side by side, but who showed a singular incapacity to coalesce. One was the trading community, of British origin, virile and adventurous, holding in its hands all the trade, both that with Europe and the fur trade with all its ramifications through the immense regions of the Far West, and the other was the agricultural and landowning community, predominantly of French origin, stubborn, reactionary, mainly illiterate, and clinging to all that it thought it had inherited from Old France; the one accustomed to the legal system in force in England and dimly conscious of the principle that an Englishman carried with him his common law wherever he went, the other seeing no reason for any change in the laws and customs with which he was familiar.

By an Ordinance issued by the Governor in 1764, civil courts had been set up constituting a compromise between the instructions which the Governor had received from the Government in London and what he felt must be accorded to the French *habitants* if the system was to work. The result was a period of somewhat chaotic administration, due mainly to the fact that no one knew what system of law was in force and resulting in a curious kind of equilibrium of compromise by which, in the courts of common pleas, the courts to which in the main the *habitants* resorted, it was French Canadian law that was applied; in the

Court of King's Bench, to which in the main the English resorted, it was English law that was applied. This anomalous system lasted until 1775 when the Act passed by Parliament in 1774 making more effectual provision for the government of Quebec came into force. This act laid it down that in matters of controversy as to property and civil rights resort was to be had to the laws of Canada as the governing rule, and all future causes were to be determined in accordance therewith. In criminal matters English law was to apply. Unfortunately, the Act—except as regards future local legislation—left the people on the spot to determine what were the Canadian laws referred to, and no one knew whether it was the old civil law of France in force before 1759 or the Custom of Paris or legislation issued in France and intended to apply specifically to Canada as a French colony.

The subject of the present volume is the story of the attempts made to administer justice in Canada under this Quebec Act during the period which elapsed before more far-reaching constitutional reforms were introduced in 1791.

The book presents a strange picture of Canadian life in the last quarter of the eighteenth century, a tale of the well-meant effort of the home Government to do justice by both sections of the population overthrown by political prejudice entrenched in an executive council where the French element was predominant and received the backing of two successive Governors, and was able thereby to obstruct all efforts to clarify and reform a system of law that was obscure and detrimental to the trading community on whose efforts the future prosperity of the Colony must depend. To add to the difficulties came the rebellion of the North American Colonies, and, when at last peace was achieved, an influx of loyalists from across the new boundary, adding a third and equally unassimilable element to the population.

Miss Neatby has studied with great care a mass of old records immense in quantity but tantalizing by its incompleteness, and has produced a thoroughly readable volume.

C.

International Raw Materials Cartels. By Professor William Oualid (Professor of Political Economy in the Faculté de Droit, Paris). 54 pp.

The Synthetic Optimum of Population. By Dr. Imre Ferenczi (of the International Labour Office). 115 pp.

Markets and the Problem of Peaceful Change. By Professor J. B. Condliffe (Professor of Commerce in the University of London). 63 pp.

These three monographs have been issued under the auspices of the International Institute of Intellectual Co-operation. They were drawn up at the request of the International Studies Conference which met in London in 1935 and was charged with the duty of investigating the various problems of peaceful change as affecting the wider problem of collective security.

Professor Oualid's monograph on raw materials cartels presents a valuable study of the subject. He takes in turn the cartels which control the production and marketing of aluminium, mercury, pulp-wood and paper-pulp, nitrates, phosphates, potash, copper, and steel. The general result is to show that cartels, wisely managed and profiting by the experience gained from the mistakes of the past, have on the whole operated beneficially; they have stabilized prices without injuring the consumer. The concluding pages of the monograph show that, in the author's belief, the problem of the unequal distribution of raw materials might be substantially mitigated if the principle were adopted of bringing the cartels under international control at Geneva.

The Synthetic Optimum of Population.

The title of this study would not readily convey to the normal reader any adequate idea of the subject of the book. The writer makes an examination of the theories and ideas put forward during the last 150 years as to over-population and under-population in given areas. He then analyses the new theory of the economic optimum of population in its more recent form, viz., the theory of optimum welfare as expressed in the individual and family standard of living. Dissatisfied therewith as a guide to the ideal population figures, he modifies the notion of the social optimum and proceeds to a concept of the optimum population which he calls synthetic, thereby meaning that he takes into account, to the extent properly required, the national economy, social policy, security, and rational demographic evolution of the country concerned, as well as procreative selection according to the principles of eugenics. He desires international action to foster the adoption of a planned international population policy, and considers that the future of the League of Nations depends largely on the development of a uniform world public opinion favourable to the realization of the synthetic optimum.

Markets and the Problem of Peaceful Change.

This small book gives a very interesting diagnosis of the economic situation which has resulted in Europe from the peace settlement of 1919 and the various efforts, national and international, to cope with the post-War difficulties and with the trade restrictions consequential upon the self-sufficiency policy adopted by the states whose aim is dominated by the theory that everything must be subordinated to preparedness for war. The author begins by taking note of the fact that the problems which have arisen in connexion with marketing are due to increasing state intervention in trading activities and that the state control thereby resulting will be continued. The mid-Victorian policy of *laissez faire* has disappeared. The state policies pursued to-day have surrounded trade with a strangling net-work of control apparatus. The only way to win back prosperity for the suffering nations is to get them to agree to arrangements which will restore liberty to trade freely. The author sees hope of this gradually coming to pass through the monetary stabilization partially achieved in September 1937 and the movement in favour of bilateral trade treaties.

A study of the book leaves one somewhat pessimistic. Whatever the blunders of the post-War settlement may have been, the difficulties of to-day result from the fact that in some countries the government prefers guns for its army to butter for its people, and believes that, speaking broadly, if it agreed to restore liberty to trade freely there might be more butter but fewer guns. Nevertheless, it is a valuable book. It gives an illuminating and realistic picture of the present position. Incidentally it shows how small would be the economic alleviation in Germany's position if her colonies were restored to her.

C.

Colonial Blockade and Neutral Rights, 1739–63. By Richard Pares, Fellow of All Souls College. Clarendon Press. 1938. vii+323 pp., including index. (21*s.*)

This book, the author explains, was originally intended as a study of the main developments in prize law in the middle eighteenth century, i.e. the Rule of the War of 1756 and, as incidental thereto, the doctrine of Continuous Voyage. The author's aim is to explain the origin of the Rule and the diplomatic consequences produced by its adoption by the Prize Courts; and he has added to this an account of the methods of "the captors" (both privateers and men-of-war) and the conditions in which they operated, and, as a natural corollary, some account of the Prize Courts and the way in which they did their work. The result is a book which, as the author says, "may appear somewhat unsatisfactory in form", but which contains an enormous amount of interesting material which is not readily accessible, particularly in relation to the West Indies, on which Mr. Pares possesses special knowledge.

The Rule of the War of 1756, according to Mr. Pares's contention, was "not a mere technicality invented by lawyers; it was a policy which the Ministry desired and public opinion loudly demanded". Its object seems to have been, in general, to provide a means of distinguishing between trading *with* an enemy and trading *for* him, a distinction of which the reasonableness was admitted by even those who defended the rights of neutrality in their fullest form. The point, which has not lost all its importance yet, was put plainly by some Prussian lawyers who contended that a neutral nation has a right to trade to all places not blockaded in all goods not contraband, "provided it only carries on its own trade without engaging in what may be justly called doing the enemy's trade for him; for then the neutral power would no longer be acting as such, but as an ally and auxiliary of the enemy, and might justly be treated as an enemy itself if after a proper warning it did not refrain from such a device". In particular, the object of the Rule seems to have been to get round the fact that Great Britain was to some extent committed to the doctrine of "free ships free goods" by special treaties, in particular one with Holland of 1674.

A point on which Mr. Pares's book contains much interesting material is as to the extent to which the executive could and did intervene in the proceedings before the Prize Courts. So far as concerns the law to be applied, it would appear that the action of the executive did not go beyond informing the Prize Courts of the classes of goods which were to be regarded as contraband, the existence and extent of blockades, and the position under any relevant treaties. The first two are now generally regarded as being matters for executive decision, while as regards the third, it would appear that the Prize Courts were frequently uncertain as to the treaty position and were anxious for some guidance from the executive, even as regards the interpretation of particular provisions, which would nowadays be regarded as exclusively a matter for the courts. Of executive interference with actual decisions, there seems to have been practically none, which is perhaps surprising since on the Court of Prize Appeals, which was really a branch of the Privy Council, the lawyers were heavily outnumbered by the politicians. The fact seems to be that the principle of the independence of the judiciary had become firmly established in consequence of the revolution of 1688, and accordingly we find that the complaints of neutral representatives were regularly met, as they have been in later days, with the reply that the matters in question must be determined by the Prize Courts and that it was not possible for the government to intervene. In point of fact, the government would probably have been very well pleased if they had possessed more power in this direction, not in order to enable them to secure improper condemnations, but to obtain either release or the abandonment of the proceedings in cases where the capture could not be justified under the relevant treaty provision. One reason for their inability to do so was that the Prize Act of 1708 had, in effect, deprived the Crown "of any right to control the seizures by administrative order and of any influence with the captors where justice and diplomacy required the prizes to be released". This was not only so as regards privateers, who had now a statutory right to the whole of their prizes, but also as regards naval officers, as to whom the Admiralty might have been expected to possess sufficient powers.

On the whole, however, the interest of this book resides less in its discussion of the doctrines of prize law than in the extremely vivid picture which it provides of the situation in practice. On such matters as the peculiar proceedings of privateers, the even more peculiar proceedings of Prize Courts in the West Indies, the subterfuges adopted by neutrals to conceal the real nature of their operations, the diplomatic questions to which these matters gave rise, and many other kindred matters, Mr. Pares's book is a mine of information, which can be warmly recommended to all who are interested in the history of prize law and procedure.

W.

The Monroe Doctrine, 1867–1907. By Dexter Perkins, Watson Professor of History in the University of Rochester, U.S.A. Baltimore: The Johns Hopkins Press and Humphrey Milford, Oxford University Press. x+480 pp. (16*s.* net.)

This volume constitutes the third of the series devoted by the author to the story of the development of the Monroe Doctrine. It comprises a course given by Professor Perkins as part of the Albert Shaw lectures on diplomatic history under the auspices of the Walter Hines Page School of International Relations. The second volume of the series, covering the period from 1826 to 1867, was published in 1933.

It is refreshing to find an American historian who can write about the Monroe Doctrine objectively. The result is a volume which is both informative and convincing. The lectures are based upon exhaustive study not merely of the archives of the State Department at Washington but also of those of the chief European countries, and of all the popular literature contemporaneous with the events affecting, and affected by, the development of the Monroe Doctrine during the period under review—newspapers, periodicals, law journals, &c., both in the United States and in Europe.

The Monroe Doctrine stands out by 1907 as what it really is: no rule of international law, but a political principle embodying the policy which at any given moment the Administration at Washington, or the orators in Congress, thought it wise to adopt in order to uphold the interests of the United States and to counter the policy or the supposed policy of some European power in a matter affecting the American continent.

Given such an elastic character, it is no wonder that the doctrine proclaimed by President Monroe in 1823 in order to warn the European powers that they must keep their hands off the new-born republics of Latin America became by 1907, when President Theodore Roosevelt was the occupant of the White House, a doctrine which sanctioned intervention by the United States Government in the affairs of those republics whenever it suited the interests of the Administration to do so; an extension of the doctrine which, to the credit of the United States, has now given way to the good neighbour policy which prevails at present.

Professor Perkins's lectures give a vivid picture of the way in which the Monroe Doctrine has attracted to itself successive accretions, such, for instance, as the no-transfer doctrine, the principle, that is, that territory in the western hemisphere already subject to the sovereignty of a European power must not be transferred to the sovereignty of another European power, or the doctrine that any canal connecting the waters of the Pacific and the Atlantic must be subject to the control of the United States, principles which the Administration could always omit to remember when it was convenient to turn a blind eye, as when Sweden ceded to France the island of St. Barthélemy in 1877.

One of the most useful feaures of this book is that it is not limited to a history of the Monroe Doctrine and its development. Such a history would in reality be little more than the story of what the Administration at Washington was doing or saying at the time of each episode when the doctrine came into play. Professor Perkins gives his readers also an insight into what the man in the street in the United States was thinking, as indicated by the speeches and the newspaper articles and periodicals of the moment, and also the views entertained in Europe on the subject of what Professor Perkins calls "this great American shibboleth", views which were not always complimentary, as well as the reactions of the Latin American republics, who were the theoretical beneficiaries of the doctrine.

Enough has been said to show that an international law publication is no place for a lengthy review of this book. The Monroe Doctrine is no part of international law; it is not even a legal principle; it is a convenient and elastic pretext on which to base the objection to any action affecting the western hemisphere contemplated by a European power which the United States Government feels it necessary to oppose.

C.

The Wal-Wal Arbitration. By Pitman B. Potter. 1938. Washington: Carnegie Endowment for International Peace. pp. 182.

This is a study of the arbitration held between the Empire of Ethiopia and the Kingdom of Italy relating to the armed conflict which occurred at Wal-Wal in the Ogaden on December 5–6, 1934. In pursuance of the Italo-Ethiopian treaty of friendship and commerce of August 2, 1928, which provided for the pacific settlement "by conciliation or arbitration" of all disputes arising between the two governments, it was agreed to appoint four arbitrators. Those appointed in the first instance were Count Luigi Aldrovandi-Marescotti (who had served on both the Manchurian and Chaco Commissions) and Signor Raffaele Montagna for Italy; for Ethiopia, Professor de Lapradelle of Paris and Professor Pitman B. Potter, an American citizen. These four arbitrators met at Milan on June 6, 1935, but had only been at work for a month when they disagreed on a question of the jurisdiction of the tribunal. After some delay a fifth arbitrator, M. Politis, was appointed. The Council of the League ruled that frontier questions or the legal interpretation of treaties relating thereto was outside the scope of the tribunal's competence, but did not exclude the taking of evidence before the tribunal as to the beliefs of the local authorities at Wal-Wal on the question of territorial sovereignty. The report was to be completed and laid before the Council by September 4, 1935.

The tribunal as thus finally constituted heard arguments as well as evidence presented by both sides and examined the facts with some thoroughness. The present volume provides the student with a complete and satisfactory account of the proceedings, but the most interesting part is that in which Professor Potter gives us the considered results of his own experience and observation as to the "lessons" of the arbitration. He points out that its work was hampered from the beginning by the confusion between "conciliation" and "arbitration" in the 1928 treaty; and recommends that the circumstances under which they are to be used should be clearly defined in advance. Professor Potter also regrets the appointment by Italy of two of her nationals to be members of the tribunal; such a possibility should, he suggests, be definitely excluded in any treaty of arbitration. The absence of a formal special agreement, and the haste, engendered by the Council's ruling, with which the proceedings were conducted in the later stages also come in for criticism.

There is one legal aspect of the case which calls for notice here. This is the Italian argument before the tribunal that the *de facto* occupation of the Wal-Wal area by the Italian Somaliland authorities over a period of several years prevailed against the cartographical evidence that legal sovereignty over this area belonged to Ethiopia. But the Commission was debarred from adjudicating upon this question.

The result in Professor Potter's opinion was a victory for Ethiopia. "It was a verdict of acquittal or 'not guilty' in circumstances where a powerful plaintiff was pressing for a verdict against a weak and helpless defendant."

Inasmuch as the treaty of arbitration was invoked by Ethiopia and not by Italy it is difficult to agree with this extraordinary conclusion.

J. M. J.

Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth. By Horace Emerson Read. Harvard University Press. 371 pp. ($4.)

This is the second volume of the Harvard Studies in the Conflict of Laws and, if the other volumes of these studies are of equal merit, this series will be a very valuable addition to the literature of private international law. The author is a professor of the University of Minnesota. The study is particularly valuable because it deals comparatively with the rules with regard to foreign judgments as applied in the principal common law countries of the British Commonwealth. In so far as the rules are still common law rules developed by the judges, all these countries are applying the same principles, and the comparison enables the reader to obtain a much more complete view of the effect of these principles than is given by the ordinary English text-book, and to weigh the English cases with the decisions of Dominion courts. For obvious reasons, Dominion courts, or at any rate those of Canada, deal with a larger number of cases involving private international law than do the English courts. In so far as the rules are statutory the comparison is interesting from the *lex ferenda* point of view.

The study is positive—the effect of the decisions is fully and accurately given. It is also critical—the author exposes those rules resulting from historical development and still (or said to be still) operative, which are anomalous in view of other developments. He criticizes forcibly certain decisions which he considers to have taken the wrong turning. Without departing from the essentially positive character of the book, the author introduces an agreeable scholarly flavour by means of a number of apt quotations from profound legal philosophers like O. W. Holmes and Dean Pound.

The study begins with the question what judgments are foreign. The answer is those of a "law district" other than the *forum*, and in connexion with federal countries like Canada and Australia, there is an interesting explanation of the complicated position which arises.

The basis of the recognition of foreign judgments is then dealt with, and here there is an excellent treatment of the requirement that the foreign judgment should be "final and conclusive" and an explanation of the origin of the rule that a foreign judgment does not merge the original cause of action, and a demonstration of its anomalous character in view of later developments. A discussion of the rules determining when a foreign court is to be deemed to possess jurisdiction follows. The decision of the House of Lords in the *Mozambique* case is strongly (but in our opinion not altogether justly) criticized; the decision of the Privy Council in the *Attorney-General of Alberta* v. *Cook* (a wife has always the same domicil as her husband and the courts of the husband's domicil at the time of the suit are alone competent) is stated to be a decision which stifles development and produces injustice.

The study concludes with the enforcement of foreign judgments (*a*) by action, (*b*) by direct means under statute. The English Reciprocal Enforcement of Judgments Act, 1933, is regarded as a surprising and welcome development. The decision of the English Court of Appeal in *Abouloff* v. *Oppenheimer*, allowing a foreign judgment to be questioned on the ground that the court has been deceived by the fraud of a party *even when the allegation of fraud is not based on any evidence extraneous to the record of the foreign proceedings*, is stated justly and conclusively to be wrong, and it is shown that Dominion courts have in general been of this opinion and have refused to follow it.

E.

Die Völkerrechtliche Stellung der Internationalen Kanäle. By Heinrich Rheinstrom. 1937. Budapest: Révai. 73 pp.

There are now only two international canals in the world, and each of these is governed by its own body of written rules. That being so, it may well be doubted whether there is sufficient material upon which to build any general doctrine of the juristic nature of such canals. For those who are attracted by pure speculation unhampered by the interference of facts Dr. Rheinstrom has written a very able analysis of the various theories which have been propounded. In his last chapter he briefly glances at the rules actually in force, and comes regretfully to the conclusion that they do not conform to any theory since they have been dictated by political considerations.

The text of the essay itself is very short, for the footnotes occupy at least as much space as the text. There is a bibliography of nine pages, but Sir Arnold Wilson's book finds no place in it—perhaps because Sir Arnold is unduly preoccupied with the study of facts.

H. A. S.

The Navicert System during the World War. By H. Ritchie. 1938. viii+83 pp. Washington: Carnegie Endowment.

The greater part of this booklet is taken up with the text of the Orders-in-Council and other documents which gave formal expression to the measures taken by Great Britain for the destruction of German trade in the Great War. Mr. Ritchie has modestly limited his own contribution to a short essay explaining the practical working of the "Navicert" system. Most of those who read it will wish that it had been longer.

The essence of the system was that it substituted a search by consent in the port of departure for the traditional procedure of search at sea and condemnation by a prize court. In so far as it thus simplified control and eliminated legal controversies its merits are self-evident, but at the same time its limitations should be clearly understood. The system can only be used by a power which enjoys the undisputed command of the sea. In the latter part of the Great War the Allied naval control was so completely efficient that the detention of ships and the capture of contraband cargoes could be predicted with certainty. That being so, it was obviously in the interest of the neutral exporter to satisfy the Allies of the innocence of his cargoes before their departure from port. The position would be entirely different if the exporter could count upon a fair chance of getting the contraband to its destination, for the profits of the trade would then be sufficient to cover a large margin of risk. Properly understood, the Navicert system is an illustration of the meaning of sea power.

The book may be obtained free of charge upon application to the Carnegie Endowment.

H. A. S.

Diritto Aeronautico di Guerra. By Roberto Sandiford. Pubblicazioni dell' Associazione Italiana per la Società delle Nazioni. Roma: Soc. Ed. del "Foro Italiano". 1937. 196 pp.

In 1931 the author published a monograph examining air warfare from the point of view of international law.[1] The new volume is designed to supplement and bring up to date his previous work in the light of the writings of jurists of various countries and of the experience derived from the progress in the field of air navigation achieved in recent years.

There is an introduction dealing with the bases of the law of air warfare, the character of air warfare and its legitimacy, the application to air warfare of the principles of war on land and at sea, and the sources of the law of air warfare. In the following chapters the author considers successively: the outbreak of war; the theatre of hostilities; lawful belligerents; military operations; air medical services; air blockade; the law of prize; visit, capture, and destruction of aircraft; participation of air forces in naval war; and neutrality. At the end of the volume there is a fairly complete bibliography and two appendices reproducing the rules of the Committee of Jurists which met at The Hague in 1922–3 and an extract from the Italian draft law prepared by the Commission appointed in September 1935.

In the various chapters the author gives a very clear presentation of legal doctrine and of the resolutions and drafts adopted by learned societies or official committees. If M. Sandiford's intention was to place at the disposal of those interested in these questions a brief but complete summary, one would have no hesitation in saying that he has been entirely successful, but it would be difficult to regard this work as a scientific contribution to the solution of the many legal problems arising in the field of air warfare.

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[1] *Note sul diritto aereo di guerra—studi di diritto aeronautico.*

J. López Oliván.

Handbuch des internationalen Handels- Wechsel- und Checkrechts. By Adolf F. Schnitzer. 1938. Zürich-Leipzig: Verlag für Recht und Gesellschaft A.G. xii+480 pp. (Swiss francs 24.)

Dr. Schnitzer has already established a reputation as the erudite author of a well-known treatise on the private international law system of Switzerland. In the volume now under review he has undertaken a general survey of certain international aspects of commercial law. It is in many ways a remarkable piece of work. Very little has escaped the learned author's observation, and the citations show an amazing knowledge of the relevant literature, at least so far as the continent of Europe is concerned. The plan of the book is ambitious: it covers such questions as commercial persons (including the international regulation of trading companies), the law of sale, pawns and pledges, international transport of goods by rail, international banking and finance, and a detailed study of the Geneva Uniform Law of Bills of Exchange and Cheques. All this matter has, perforce, been compressed to the utmost, with the result that the book is more serviceable as a guide to the questions with which it deals than as an authoritative text-book. Nevertheless it reveals a degree of industry and a grasp of detail which are very rare and make up to a large extent for the deficiencies arising from the piecemeal and somewhat superficial treatment which is given to some of the topics.

H. C. G.

Marchi di Fabbrica e di Commercio nel Diritto Internazionale Privato. By Professor Angelo Piero Sereni. 1938. Milan: Giuffré. 208 pp.

Professor Sereni's monograph deals with the highly technical question of the Conflict of Laws relating to trade-marks and designs. It is a careful and well-reasoned statement of the position with special regard to Italian domestic legislation on the matter and the various conventions which have attempted to secure international regulation of the law of industrial property. This treatise will be useful to specialists in the law of trade-marks and also of interest to private international and comparative lawyers by reason of the light which it throws on the history of the efforts to unify this difficult branch of the law.

H. C. G.

The Process of Change in the Ottoman Empire. By Wilbur W. White, Assistant Professor of Political Science, Western Reserve University, U.S.A. Chicago University Press. Illinois. ix+313 pp. ($3.50.)

The aspirations embodied in Article 19 of the Covenant to the effect that the Assembly might by appropriate action secure the peaceful modification of treaties which no longer fulfil their purpose, make all studies on this subject valuable. The gradual contraction and decay of the Ottoman Empire between the period when it reached its zenith and the present time provides abundant material for the study of the problem, material which is in reality too abundant to be dealt with in a volume of 300 pages.

The plan followed by the author is to divide the lost Turkish territories into three groups: European, African, and Asiatic, and to take in each group one country and describe with such fullness as space allows the course of events by which that particular country attained its present status, and then to give in another chapter a succinct account of the corresponding events in the other countries situated in that same group. In the European group, Greece is chosen as the country where the gradual evolution to independent sovereignty is described in detail, the Balkan States being each given more cursory treatment. In the African group, Egypt is given the fuller treatment, while events in Algeria, Tunis, and Libya (Tripoli and Cyrenaica) are sketched only in outline. In the Asiatic group, the story of Iraq is told with some fullness, the remaining Arab states, Syria, Palestine, Transjordan, Saudi Arabia, less fully. There follows a chapter dealing with the history of Turkey itself since 1774.

The author's method is quite logical, but the subject is too large to make the resulting volume satisfactory. No man, for instance, can give in 35 pages an adequate picture of the history of Egypt for the last century—from the time of the Mamelukes to the Montreux Conference. To attempt to do so is to reduce the story to little more than a catalogue of events, and when that happens there is always the risk that the author will fail to see the wood for the trees.

Furthermore, the course of events in Egypt had little bearing on the developments in the former Ottoman territories in the east of North Africa; the circumstances were so totally dissimilar; and a student who wishes to understand the reasons underlying the gradual changes in Algeria will not obtain much help from a study of what has happened in the land of the Pharaohs.

The outstanding feature of the gradual contraction of the Ottoman Empire and the resulting changes of sovereignty in the territories lost to the Empire is the high proportion of these changes which were due to war; when not due to war they were until recently the result of illegalities which might have led to war, and probably would have done so, had any particular Great Power thought it worth while to run the risk. It is not surprising that this should be so. The Ottoman Empire was created by the sword—it also perished by the sword.

Dr. Wilbur White's book tells a story which cannot serve as a pattern for the application of Article 19. It serves in reality to show the great need for some effective method of securing the peaceful amelioration of unjust conditions resulting from a previous resort to force—a method which is still to seek.

C.

The Spirit of the Legal Profession. By Robert R. Wilkin. 1938. Yale University Press. London: Humphrey Milford. 173 pp. ($2.50.)

Judge Wilkin is a distinguished member of the Ohio Bar, and a former judge of the Supreme Court of that State. This little book contains the substance of a series of addresses delivered in the Ohio State University College of Law, designed particularly to inspire the student body with an informed sense of the traditions and ideals of their intended calling.

The first three parts are devoted to summary reviews of the history of the legal profession in Rome, in England, and in the United States. In the fourth and last part Judge Wilkin speaks of the calling and responsibilities of the American lawyer at this present day. The profession of the law, as it was the first, so to-day it is the principal, profession; and it has an imperative duty to look upon itself as called to public service. That to call forth public service of the highest value great financial rewards are not necessary is illustrated by the record of the Corps of Engineers of the United States army, where members, "men of assured position and respectable income, have surmounted avarice and rendered service of inestimable value". An Englishman would have spoken more generally of "civil service". Judge Wilkin has misgivings as to the tendency of democracy, on too large a scale, to be indifferent to high standards of character in its rules; it is for the organized professions, and particularly for that of the law, to counteract this tendency. He deprecates the popular election of judges, and considers that the bar, which is best able to appraise its own members, should have a greater control than it has over judicial appointments.

M. S. Amos.

Le Contrôle de l'application des conventions internationales du travail. Par Jean Zarras. Paris: Recueil Sirey. pp. 386. (70 frs.)

This work is the result of several months spent in the Library of the International Labour Office in contact both with a mass of published and unpublished material and with the staff of the Office. So far as we are aware, it breaks new ground. It has been well worth doing, for it takes us into the heart of a successful piece of international administration about which little is known.

M. Zarras first examines the legal nature of the Labour Conventions and the process of "ratification", not a very appropriate term as applied to them, and a number of legal questions connected with the supervision of their application by Members who "ratify" them. He then passes to what is the central portion of his study—"Le contrôle mutuel", the obligation imposed upon Members by Article 22 of the Constitution to make annual reports upon the application of conventions "ratified" by them, the nature and content of those reports, their examination by the Committee of Experts set up in 1927, the examination of its report by the Committee appointed by that Conference each year, and the discussions by the Conference.

Another section deals with "Réclamations, Plaintes et Sanctions", and is, of necessity, mainly theoretical.

The only portion of the book upon which your reviewer can speak with any degree of authority is "Partie C. Le contrôle mutuel". M. Zarras appears to have diagnosed correctly the reasons of the success of this piece of international machinery. The only sanction is public opinion, clearly though politely focused upon shortcomings in the application of conventions by the Committee of Experts. The degree of application is very far from being what it should be, but without a doubt the Committee has been able to coax out of the "ratifying" states a steadily rising level of application—notably in the colonial field. Where the will to international co-operation exists, as it does in labour matters, the machinery works, and governments will submit to an amount of cross-examination and criticism which thirty years ago would have seemed impossible.

M. Zarras is to be congratulated upon doing a useful piece of work.

A. D. McN.

The Legal Aspect of Money. By Dr. F. A. Mann. Oxford University Press and Humphrey Milford. xxv+334 pp. (21*s.* net.)

The review of this book is held over until the publication of the 1940 volume of the *British Year Book of International Law.*

REVIEWS OF CURRENT PERIODICALS

The American Journal of International Law. Vol. XXXII. 1938.

The main impression left by this volume is of the disturbance produced in the sphere of international law by the activities and theories of politicians and publicists in the totalitarian states. The hard lot of the jurist in a country where change of official policy—in this case from rebus sic stantibus to pacta sunt servanda—may entail not only discredit of theories but also punishment of theorists, appears from Mr. J. N. Hazard's account of the process of "Cleansing Soviet International Law from Anti-Marxist Theories". In an article on "The National Socialist Theory of International Law" Miss V. L. Gott emphasizes the anti-rationalist trends of present-day German thought. Professor Garner deals with the general questions of state succession raised by the German annexation of Austria and also contributes a trenchant note upon Herr Funk's repudiation of legal liability by the Reich. The attacks upon foreign shipping in the Mediterranean occupy M. Genêt and Professor Padelford. They agree that the term "piracy" is not properly applicable, but while the former thinks all reference to piracy should have been omitted from the Nyon Agreement, the latter holds that the foreign powers were justified in treating the acts as "assimilated to piracy". It is surprising to find M. Genêt describing the four submarine attacks in as many days as "of little importance" and the subsequent protests as "much ado about nothing". The issues raised for the United States by the propagandist use of broadcasting are brought out by Mr. H. S. LeRoy's article on "Treaty Regulation of International Radio and Short-Wave Broadcasting", while Dr. Louise Holborn urges the need for a generally accepted legal status for political refugees as a factor in facilitating their settlement. Finally, Mr. E. T. Williams calls upon the democracies to take measures for their own safety against the autocracies.

Of interest to English readers are Professor Stewart's pages on "Canada and International Labour Conventions" and "Treaty-making Procedure in the British Dominions". He looks to the amendment of the British North America Acts for the only satisfactory solution of the difficulties which Canada's Federal Constitution has placed in the way of fulfilment of her international obligations. Mr. J. Simsarian discusses "The Diversion of Waters affecting the United States and Canada". Two cases of intervention on the ground of "self-preservation" by Great Britain are the subject of articles by Mr. R. Y. Jennings, "The Caroline and McLeod Cases", and by Mr. C. J. Kulsrud, "The Seizure of the Danish Fleet, 1807". Mr. Kulsrud concludes that in the latter case English action was inevitable.

Professor Goodrich considers "The Nature of the Advisory Opinions of the Permanent Court", while Mr. Hudson, in addition to his usual very useful review of the past (sixteenth) year of the Court, also writes on "Twelve Casebooks on International Law", another subject on which he can speak with authority. Mr. H. W. Spiegel on "The Origin and Development of Denial of Justice" and Professor Eagleton on "The Form and Function of the Declaration of War" have something to say of the difficulty of distinguishing reprisals from war. Professor Eagleton is driven to conclude that a declaration has "no form and no effective functions"; so far as international law is concerned "the declaration of war may be issued after the war is ended and the treaty of peace signed".

The other articles are Mr. J. R. Clark's on "Foreign Bondholdings in the United States", containing a number of interesting facts, Professor Lockey's on "Pan-Americanism and Imperialism", and Mr. L. W. McKernan's on "Special Mexican Claims" to which the Report of Decision No. 1 on p. 858, containing the general principles applied by the Commission, adds a valuable illustrative supplement.

It need hardly be said that the editorial comments, notes, book reviews, and the section on official documents are as informative and indispensable as ever.

J. W. J.

Revue Générale de Droit International Public, 1938.

Owing to the earlier date at which the *Year Book* is going to press, only four numbers of the *Revue Générale* are available for review.

Professor Rousseau's interesting account of "Le conflit italo-éthiopien" is concluded in an article which deals with events from May 1936 to March 1938, particularly the Italian annexation of Ethiopia and the questions, mainly in relation to recognition, to which it gave rise. If, as is to be hoped, these articles are published separately, it would be well to carry on the story to the end of 1938, so as to cover the Council meeting in May and the subsequent action in the nature of *de jure* recognition taken by Members of the League. Professor Scelle's article on "La Guerre civile espagnole et le droit des gens", the first of a series, after some observations on the nature of civil war, deals with the problems resulting from the removal by the Spanish Government of valuables from Bilbao and from the requisitioning by the same government of merchant ships. Professor Scelle deals mostly with the decisions of the French courts on these matters, but also mentions the decision of the House of Lords in the "Cristina". He holds that the Spanish Government was right in claiming that in these cases the title to the property and its possession could not be the subject of adjudication by a foreign tribunal.

In three lengthy articles Professor Kelsen completes (except that he has not yet dealt with Article 15) his "Contribution à l'étude de la révision juridico-technique du Pacte", and the result of his amendments is to leave very little of the Covenant as we know it. His ideas of what may be regarded as drafting amendments are pretty wide, as illustrated by the fact that he proposes to strike out the words "likely to lead to a rupture" in Articles 12 and 15. The interest of his study lies, however, less in the actual amendments proposed, than in the discussion of the history and original intentions of the different articles; from this point of view the comments on Article 10 are particularly interesting, and there is a good discussion of the nature of "justiciable" disputes. M. Chrétien, formerly lecturer in the Faculty of Law at Cairo, in "La suppression des capitulations en Égypte", gives a useful account of the former judicial system in Egypt, the negotiations which ultimately led to the Montreux Conference, and the new system resulting from the Convention signed there. It is mainly an historical account, but there is a useful discussion of the nature of the non-discrimination between Egyptians and foreigners which is prescribed by the Montreux Convention, and he thinks that this question, as well as others, will ultimately have to be decided by the Permanent Court. Professor Verdross, in a short article, argues in support of the theory that the general principles of law constitute an important part of international law, and criticizes the view that Article 38 (3) of the Statute of the Permanent Court is meaningless.

M. Campagnolo's article on "La Paix, la Guerre et le Droit" is thoughtful and distinctly original, but somewhat difficult to follow. His contention appears to be that the relationship between states, in time of peace as in time of war, consists of "un antagonisme radical"; that war is only a particular manifestation of this antagonism; that treaties have no binding effect but are merely statements of a programme, and that the whole idea of the Covenant is erroneous because "les gouvernements ne peuvent être engagés par les traités que dans la mesure où leurs engagements sont conformes à la loi de leur pays". M. Escudero, of the University of Santiago, in "L'Étude des Relations Internationales et la récente Conférence de Prague" reproduces some considerations, based on the work of M. Alvarez, which he presented to the Conference. He holds that the world needs two new sciences, "la science de la vie internationale" and "la science de la psychologie des peuples", and that these should be the subject of a study which must be "ample, objective, synthétique, réaliste, psychologique et reconstructive". Professor Gidel commemorates the centenary of the publication of the *Elements of International Law* by an account of Wheaton's career, largely drawn from Miss Baker's book which was reviewed in the *Year Book* of 1938. M. Métall of Geneva contributes a short article on "Les fonctions des consuls en matière d'assurances sociales". The adoption of systems of social insurance by most countries has led to the conclusion of a considerable number of bilateral treaties, under which new rights and duties are conferred upon the consular officers of the contracting states.

W.

Journal de Droit International (*Clunet*), *1938*, Parts 1, 2, 3, and 4.

In the first four numbers of Clunet (1938) there are fourteen articles of which the following are of most interest to English readers:

(1) Monsieur F. Honig writes on the rules applicable in England to the devolution of the estates of foreigners domiciled there: his article, however, presents a rather confusing and not very accurate picture.

(2) Monsieur J. Guilhot contributes a very interesting explanation of the application of the French Dividends Tax (Law of June 29, 1872: decree December 6, 1872) where foreign companies controlling subsidiary French companies are concerned. The application of this tax in these cases has given rise to much difficulty and protest and led to the conclusion of various taxation agreements with foreign governments. The French administration, in its efforts to avoid "tax dodging", had been led to apply the law in a manner which in many cases created injustice. The author suggests that the process, familiar in England as well as in France, under which the administration and legislature run after the tax dodger, stopping up his holes, is never satisfactory and it would be better simply to rely on *fraude à la loi* before the tribunals (i.e. ask the tribunal to decide in each case "is this an honest and justifiable arrangement or is it tax dodging?"), and there are many people in England who think the same.

(3) Messieurs P. and J. Pellerin write on the English "Matrimonial Causes Act, 1937"—an excellent article but with one or two slips and misprints.

(4) Messieurs C. and J. Denoyer discuss the question whether under French law (including the treaties applicable) British subjects in France are liable to give "security for costs" (*cautio indicatum solvi*) and conclude that they are not,

though the courts continue to render conflicting decisions on the question. (There is a decision reported in Clunet this year where the Court of Appeal at Amiens held that they were.) In any case, as the authors state, the supplementary Civil Procedure Convention of 1936 will make the position clear when it comes into force. British subjects will then give security in these cases where they (and French citizens) have to give it in England, but in no other cases.

(5) Monsieur Martin Domke discusses a draft Swiss law on the choice of law in the matter of contracts of suretyship, and shows that legislative measures in the sphere of private international law are generally good in so far as they are a real effort to codify or classify the customary rules, but bad in so far as they are influenced by a desire to "protect" this or that particular class or interests.

(6) Monsieur J. Scheftel discusses the decisions of the United States courts with regard to Soviet legislation nationalizing property and dissolving companies, rendered after the recognition by the United States of the Soviet Government—in particular the decision of the Supreme Court (reported on p. 569) of May 1937. The courts of New York State had in a series of decisions declined to recognize the effect of Soviet legislation on the ground that it was contrary to public policy (State or United States) (i.e. taken a line similar to that taken by continental courts and different from that taken in England). The Supreme Court disapproves of this line and would appear to adopt the territorial principle followed in England (that such legislation is recognized in so far, but only in so far as it applies to interests situate inside the territory of the Soviet Government) but rather puzzlingly appears to bring a debt owed to a Russian company by a person in the United States within this principle.

(7) Monsieur Phillonenko discusses recent French decrees of May and June 1938 with regard to the expulsion of stateless persons and fears that they will not greatly improve the position under which individuals are sentenced for disobeying expulsion orders when they cannot help it because in fact they cannot leave the country.

Amongst the judicial decisions reported, French decisions with regard to "Spanish ships" on pp. 53, 57, and 288 may be noted. The immunity of a ship requisitioned by the Spanish Government was admitted but not of a ship chartered by the Basque Government. Apparently the French courts hold that the Spanish Government can requisition Spanish ships in a French port—a point not yet decided in England. On p. 303 there is an interesting decision on an application to enforce in France an English judgment for costs under the recent convention. The case revealed a *lacuna* or piece of defective drafting in the convention but the English judgment was enforced in part though not on the basis of the convention.

E.

Revue Internationale française du droit des gens. Paris, 1938.

The volume for 1938 reflects the atmosphere of crisis. There are two articles by M. Cotaru on "La crise de la Société des Nations" and two by M. Leresche on "La crise du droit des gens". M. Cotaru expounds the gospel of regional security within the "general framework" of Article 10 of the Covenant. This article, he assures us, was not intended to be more than a principle of growth on which the federal union of Europe might be based. Regional understandings are, he points out, expressly recognized by Article 21 as not being inconsistent with the Covenant. As examples of such a basis for collective security he refers to the British

Commonwealth, the Little Entente, the Balkan Entente and Council, the Bulgaro-Yugo-Slav Pact, 1937, and the London Convention of 1933. The contribution of M. Leresche attempts to show that the present crisis of international law is not without precedent. He examines the effect of non-observance of the law on its general content. There are four articles on Article 16 of the Covenant, three of them by Dr. Walter Schiffer and one by M. Meitani. Dr. Schiffer's articles are historical and critical but hardly constructive. M. Genêt writes once more on piracy and also contributes a study devoted to a comparison between the procedure of the Permanent Court of International Justice and the Roman formulary system. Dr. Korowicz writes on "La personnalité internationale de l'individu d'après la Convention relative à la Haute Silésie (1922–37)". M. Antonesco's article on the Little Entente and the Balance of Power in Europe is political rather than legal. Mlle Liebreich's survey of German literature on international law is valuable. There are many useful notes, such as those on the annexation of Austria, the Declaration of Neutrality by the Oslo Powers, and other documents and decisions of international interest.

J. M. J.

Revue de Droit International et de législation comparée. 1938.

This volume maintains the high standard of its predecessors. Most of the articles deal with current problems of public international law, although there are several on the conflict of laws. Professor Gutteridge considers the conflict of jurisdiction in divorce and separation, in the light of the 1902 Hague Convention, of the Code Bustamante, and of the Stockholm Convention of 1931, and states that the domicil test is now as important as the nationality test, although he favours the concurrent jurisdiction of the courts of nationality and domicil (the latter based on residence for three or five years) and believes that the *lex fori* should govern. Dr. van Hille contributes notes on recent Belgian cases on the marriage and divorce of foreigners, where the courts apply the national law, unless it is contrary to Belgian law; exceptions now exist as regards Jews and Russians, to whom Belgian law applies. Dr. J. De Visscher deals with the time and place of formation of contracts by correspondence: he stresses first the need for classification, then for the choice of law, and believes that the law of the domicil of the offeror should govern. Dr. R. Coquoz considers the problem of international unification of air law, and favours codification to avoid conflicts. Professor Raestad analyses at length the right of states to give asylum, and emphasizes the distinction between "interior" asylum, in a legation, and "exterior" asylum in another state. He believes that states are entitled to give "interior" asylum, even inside consulates, and that those giving "exterior" asylum may help the refugee socially and economically. Dr. J. Mirwart writes on piracy and international recognition, in the light of the Nyon agreement, and states that it is wrong to designate as piracy the illegal sinking by submarines.

Dr. H. Marx considers the problem of the juridical nature of mandates and believes that mandatories are trustees as in English law and are therefore sovereign. Mr. J. C. Hales stresses a contrary view in "the legal aspect of the termination of mandates", where he sets out six different methods of termination. Mr. G. Cohn (of the P.C.A.) writes on neo-neutrality, which aims at stopping war without taking part in it and irrespective of the merits of the parties. Professor Schindler of Zürich reviews Swiss neutrality; after reluctantly joining the League, Switzerland refused to allow the passage of troops in 1921, and is now free from the obligation to impose sanctions, being again neutral. Dr. H. Herz considers the present Sino-Japanese conflict and argues that Articles 16 and 37 of the Covenant should apply; he deplores that nothing resulted from the Brussels Conference of 1937 and declares that the Assembly should even now take measures to end the war.

Professor Rousseau of Rennes contributes a masterly summary of the Spanish Civil War and notes the Republican claim that the creation of the Non-Intervention Committee was intervention in Spanish affairs, but he believes that third states were only under an obligation not to help the rebels, and need not assist Valencia; he points out that the French have treated the Nationalists as *de facto* authorities in Morocco and that many countries have treated both parties as *de facto* belligerents, as regards warlike operations. Professor Raestad also contributes an article on the same subject.

There are other articles by Mr. L. Leclère, who analyses the report of the Franco-German historians on the interpretation of their respective histories; by Dr. J. Mirwart on Intellectual Co-operation between states; by Mr. J. Nisot on superfluous clauses in international treaties; by Professor Donnedieu de Vabres on the international repression of terrorism, in the light of the Geneva Convention of 1937; and by Dr. R. Genêt on the procedure of the Permanent Court of International Justice as regards counterclaims.

There are also the usual excellent reviews of books and periodicals.

J. C. Hales.

Niemeyers Zeitschrift für Internationales Recht. LIII Band (Schlussheft). Berlin: Vahlen. 1938.

British international lawyers will hear with regret that this is the last occasion on which this well-known journal will appear as a separate publication. Its existence is henceforth to be merged in the *Zeitschrift für Völkerrecht,* published in Berlin by Dr. H. Broermann. We are told in the swan-song of a short prefatory note that "The Editors and Publishers have decided on this step in order to follow the call to the unification (*Vereinheitlichung*) of literary work in the sphere of international law and the law of nations as well as elsewhere. They are convinced that the combination thus intended of all forces will prove of value for the development of this province of learning which to-day is of such importance for Germany, and will also be useful and welcome to our readers and especially to the friends of German legal science abroad".

The number contains articles by Wolfgang Pinder on diplomatic immunity in German civil law; by Dr. Rolf Stoeber on German legal decisions on the gold mark clause on the basis of the dollar in life insurance policies; and by Friedrich Wilhelm von Schelling on two questions arising on recent German legislation on the subject of transactions in foreign currency and of the gold clause. Of the three "notes" (*Materialen*) two are on this same subject of the gold clause in German legislation, and one is an interesting contribution by Dr. Eduard Wahl of Göttingen on the Anglo-Saxon conception of the extra-territorial operation of municipal law.

J. F. W.

Journal of Comparative Legislation and International Law. Vol. XX. 1938.

This has always been an eclectic journal. In the present volume the net has been spread so wide as to make the second part of the title of the journal somewhat misleading, for of the twenty-one articles, only two are of direct interest to the public international lawyer. Mr. Brookfield contributes a useful study of the immunities of foreign states engaged in private transactions, comparing the English with the continental practice. Dr. Spiegel writes shortly on the main features of the American neutrality legislation, though it is not clear to the reviewer why measures which have become Acts of Congress should be consistently referred to as Bills. In addition, international lawyers will probably be interested in Mr. Das's discussion of the treaty-making power in the Government of India Act, 1935, as read in the light of the Canadian experience, although Mr. Das is interested only in the constitutional law aspect. Mention should also be made of Sir Benjamin Lindsay's informed and eminently readable essay on the Indian States in Federation. For conflict lawyers Mr. Graveson contributes an interesting study of matrimonial domicil and the contract of marriage, while Mr. Farnsworth discusses what amounts to "carrying on business" by a foreign corporation. As usual, many of Professor Keith's notes on Imperial constitutional law deal with matters of international law concern; there are notes on the agreement with Eire, the Dominions and the League Covenant, the immunity of Indian States, conquest and cession, the determination of the capitulations in Morocco and Egypt, and on Australian nationality.

R. Y. J.

Nordisk Tidsskrift for International Ret (Acta scandinavica juris gentium). Vol. IX (1938).

The review contains as usual a summary, in French, of the events of international interest in the Scandinavian countries.

Mr. Helmer Rosting, former High Commissioner in Danzig and Director of the Minorities Section of the League of Nations, writes on the modern minority treaties. He considers that during the first years the mere existence of these treaties and the authority of the League of Nations—or perhaps the authority of the great allied powers through the League—undoubtedly contributed to make the transitional period easier for the minorities in Eastern Europe. But subsequently the inconsistent manner in which the principles underlying these treaties have been applied has had increasingly unfortunate results. Owing to the bureaucratic rigidity of the preliminary procedure, ill-founded petitions presented by individuals had to receive the same treatment as questions of great importance, and the whole system fell into discredit. Finally, the lessening of the League's prestige during recent years has fundamentally undermined the efficiency of the minority system.

The young and eminent Norwegian international jurist, Edvard Hambro, contributes articles on the new American neutrality legislation and on Communist and National-Socialist international law.

Mr. B. M. Telders, professor at Leiden, writes on the recognition of the Italian Empire and international law, and Olof Höijer contributes an article on air blockade.

J. J.

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(In this Bibliography the following abbreviations are used: Acad. dip. int. = Académie diplomatique internationale; Acta Scan. = Acta Scandinavica Juris Gentium; A.J.I.L. = American Journal of International Law; B.Y.B. = British Year Book of International Law; Grot. Soc. = Grotius Society Transactions; H.R. = Recueil des Cours, Académie de Droit International de la Haye; J.C.L. = Journal of Comparative Legislation and International Law; J.D.I. = Journal de Droit International; J.I.L.D. = Journal of International Law and Diplomacy; J.R.U.S.I. = Journal of the Royal United Services Institution; L.Q.R. = Law Quarterly Review; Niemeyers Z. = Niemeyers Zeitschrift für internationales Recht; Rev. de der. int. = Revista de derecho internacional; Rev. de dr. int. = Revue de droit international; Rev. de dr. int. et de lég. comp. = Revue de droit international et de législation comparée; Rev. de dr. int., des sci. dip. et pol. = Revue de droit international, des sciences diplomatiques et politiques; Rev. Gén. = Revue générale de droit international public; Riv. di dir. int. = Rivista di diritto internazionale; V.u.V. = Völkerbund und Völkerrecht; Z. f. aus. int. Privatrecht = Zeitschrift für ausländisches internationales Privatrecht; Z. f. aus. öff. R. u. V. = Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht; Z. f. V. = Zeitschrift für Völkerrecht.)

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